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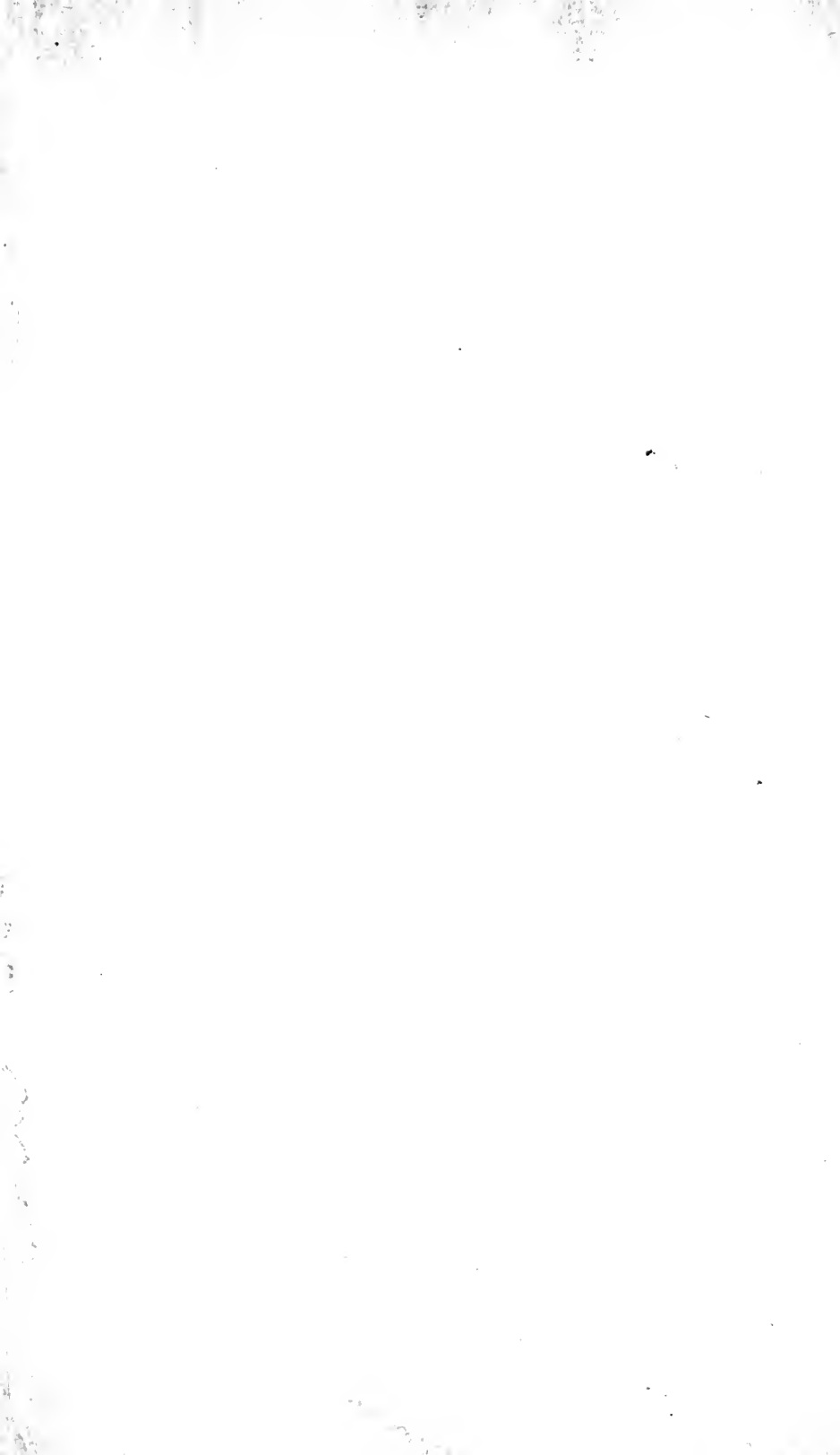
"CLEANSED OF WORDS WITHOUT REASON, MUCH  
OF THE LANGUAGE OF THE LAW NEED NOT BE  
PECULIAR AT ALL. AND BETTER FOR IT."

THE LANGUAGE OF THE LAW  
BY DAVID MELLINKOFF



Edw Mawson

Book



BBRA

*B A C O N*'s  
ABRIDGMENT.

By G WILLIM.

VOL. VI.

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*See House*  
*also 52.*

N E W  
*Chen Marvin*  
A B R I D G M E N T

OF THE

L A W.

By MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

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THE FIFTH EDITION, CORRECTED;  
WITH CONSIDERABLE ADDITIONS,  
INCLUDING THE LATEST AUTHORITIES;  
By HENRY GWILLIM,  
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

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IN SEVEN VOLUMES.

VOL. VI.

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L O N D O N :

PRINTED BY A. STRAHAN,

LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

For T. Cadell, C. Dilly, G. G. and J. Robinson, J. Johnson, R. Baldwin,  
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J. Butterworth, E. Newbery, W. Clarke and Son, J. Stockdale,  
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R. Bickerstaff, and J. White.

1798.



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## Rent.

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[ALL property, by our law, is presumed to have been originally in the crown; and the king portioned it out in large districts to the great men that had deserved well of him in the wars, and were able to advise him in time of peace. This was the nature of their tenure; and these were all the services the king expected in return for such concessions. But these large districts or countries would have been but of little use, either to the lords, or to the publick, if they had continued in their own hands: In such a case, they must, in the midst of their large territories, have wanted almost the necessaries of life; and the publick that strength and security, which land well peopled and cultivated produces and yields. Hence it became necessary to subdivide those territories; and the division must necessarily have been made among two sorts of men, to answer the several necessities of the lord and the publick;—the *military men*, to attend the lord in the field, and venture their lives for their country;—and the *socmen*, to plough the demesnes which the lord kept in his own hands for the support of his own table, or to make an annual return of corn and other provisions for that use and purpose: and hence, by the way, the lands which the socmen held were called *farms*, from the *Saxon* word *feorm*, which signifies provisions.

Gilb. on  
Rents, 1, 2,  
&c.

These corporal services, as money multiplied and trade increased, were changed into money by the consent of the tenants, and the desire of the lords; and, as the military tenure began to decline, they admitted of compositions from the feudal tenant for not attending his lord in the field, and those compositions were ascertained by parliament after the war was over, which was called *escuage*: This change of the services seems to have been for the ease and advantage of the lords, because they were no longer obliged to carry their own provisions to the camp, when they had money from their tenants, which in every place would sufficiently provide them with all the necessaries of life.

The remedy for the recovery of rent is by way of *distress*, which seems to have come over to us from the civil law: for anciently, in the feudal law, the not paying attendance on the lords' courts, or not doing the feudal service, was punished with the forfeiture of the estate. So is *Vigellius*, in the title *Cause ex quibus Feudum amittitur*; viz. "Si vassalus domino non serviat, fidelitatemque ei

“ non præstet; si vassalus, a domino ejus vocatus, non venerit; “ si pactum feudi non fervetur.” But these *feudal forfeitures* were afterwards turned into *distresses*, according to the pignorary method of the civil law; that is, the land that is set out to the tenant is *hypothecated*, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land are liable to the lord’s seizure, for the payment and satisfaction of it.

Besides this, the lord had another security by the feudal law for the faithful performance of his services: and that was, the solemn engagement made by the tenant upon his first entering into the feud, by the doing *homage*, and taking the oath of *fealty*: by which the tenant solemnly swore and undertook, to bear faith to him for the lands which he held, and lawfully to do the customs and services which he ought to do at the terms assigned him: hence came that connexion between the lord and tenant, in the feudal law, that dependence and attendance of the tenant in all the circumstances of life and articles of danger; and, in return of that service and fidelity, the utmost protection the lord could give him: “ Debet quidem tenens manus suas utraque “ ponere inter manus utraque domini sui; per quod significatur, “ ex parte domini, *protectio*, *defensio*, et *warrantia*; et ex parte “ tenentis, *reverentia* et *subjectio*.”

This oath of *fealty* or fidelity was, we see, taken by the tenant on account of the lands holden from the lord; for so says the tenant,—“ *that he will be faithful to the Lord for the lands which he holds;*”—and therefore this engagement must subsist while the tenure between the lord and tenant remains: and it was looked upon to be so sacred an obligation, and so necessary to be punctually observed, that originally, as we have observed, the breach of it was attended with no less a penalty than the forfeiture of the *feud* itself; and afterwards, when the rigour of that law came to be mitigated, with a seizure of every thing that was found on the land. Now the distress being substituted instead of the seizure of the *feud*, we may easily account, why the power of distraining always attended the *fealty*, or, as the law-books term it, was inseparably incident to it; because the power of seizure could only belong to him in whose *homage* the tenant was, and to whom the lands must return when the feudal donation to the tenant was spent; for it had been unreasonable and absurd, that the tenant should forfeit his land for not paying a service to a person to whom he never obliged himself by any oath or engagement: and hence it is, that if the lord upon the donation had reserved to himself any gabel or rent, and had afterwards granted the rent to a stranger, though the tenant had attorned, or consented to the grant, yet the stranger could not distrain for the rent; for as the power of seizure, so the distress that was substituted in its place, belong only to him of whom the lands were held, and in whom the right of *reverter* was when the feudal donation was spent; and therefore, the stranger who could pretend no such right from the grant, could have no power of seizing the *feud* for the

the non-payment of rent, nor consequently of distraining, because then the land would be liable to two different seizures at different times.

So it was upon lesser donations : as, if a lease had been made for life, reserving rent, and the lessor grants the rent, the grantee has no remedy for the recovery of it, for the former reason : but, if the reversion itself had been granted to a stranger, the whole services incident to it had past ; and the grantee, after attornment, might well distrain, because the tenure must necessarily be of him to whom the lands must return when the feudal donation is spent ; and the tenant must owe his fidelity to him whose tenant he is, because it were contradictory, to make him bear faith for the same land to different persons ; therefore the obligation of his first oath of fidelity must cease, since he no longer holds any land of him to whom he made it. But these things will be considered more at large in treating of rents under the following division :]

(A) Of the several Kinds of Rent : And herein,

1. Of Rent-Service.
2. Of a Rent-Charge.
3. Of a Rent-Seck.

(B) Out of what Things a Rent may issue.

(C) Upon what Conveyance a Rent may be reserved.

(D) By what Words a Rent may be reserved or created.

(E) How several Rents may be reserved in the same Deed.

(F) Of the Day of Payment.

(G) To whom Rents may be reserved or granted.

(H) Of the Continuance of the Rent, and to whom to be paid ; and therein, of the distinct Interests of the Heir and Executors of the Lessor.

(I) Of the Recovery and Demand of the Rent : And herein,

1. In what Cases a Demand is necessary.
2. The Time of Demand.
3. The Place where a Demand is to be made.

(K) The several Remedies for the Recovery of Rents : And herein,

1. Of the Remedy by Distress.
2. Of the Remedy by Writ of Annuity.

3. Of the Remedy by Assise.
4. Of the Clause of Re-entry.
5. Of the *Nomine Pœne*.
6. Of the Remedy by Action of Debt, and as grounded on several Acts of Parliament.

(L) Rent when and how discharged; and herein, of the Eviçion of the Tenant.

(M) Of Apportionment; and herein, of the Suspension and Extinguishment of the Rent.

1. In what Cafes a Rent may be apportioned by the Act of the Parties; and herein, of the Difference between a Rent-Service, and a Rent-Charge.
2. In what Cafes it may be apportioned by the Act of Law, or the Act of God.
3. The Manner of fuch Apportionment, and how the Tenant fhall take Advantage of it.

(A) Of the feveral Kinds of Rents: And herein,

1. Of Rent-Service.

Lit. feñt.

213.

(a) So called because the ancient re-tribution was

made by the corporal service of the tenant in ploughing his lord's demefne, which came afterwards to be changed into gabel or rent; but the service of fealty is still incident to a rent-service. Co. Lit. 142.

— That fuit to a mill is rent-service. Bro. tit. Ten. pl. 26.

**LITTLETON** describes a rent (a) service to be where the tenant holdeth his land of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other services and certain rent.

Co. Lit.

96. a.

Stil. 397.

2 Ld. Raym.

1160.

The services are of two forts, either expreffed in the lease or contract, or raised by implication of law. When the services are expreffed in the contract, the *quantum* must be either certainly mentioned, or be fuch as by a reference to something else may be reduced to a certainty; for if the lessor's demands be uncertain, it is impossible to give him an adequate satisfaction or compensation for them, as the jury cannot determine what injury he has sustained.

Lit. feñt.

135, 136.

Hence it is, that the lord cannot distrain his tenant in *frankalmoigne*, for the duty of fuch tenant being to make orisons, prayers, and masses, and to do other divine services for the soul of the feoffor, the number of which is not expreffed, the service is altogether uncertain; and therefore the remedy is before the ordinary, who may inflict ecclesiastical censures for fuch omission.

Co. Lit.

96. a.

2 Ld. Raym.

1161.

But, if the tenant holds of his lord to sheer all his sheep feeding in fuch a manor, this is certain enough, because it is easy to compute the number within the precincts of the manor, and, consequently, what expence the lord is at in employing others in that



that work, and what damages he has sustained by the omission of his tenant.

In debt for rent on a demise, *reddendum* after the rate of 18 *l.* *per annum*; this was adjudged a void reservation for incertainty; because it may be in corn, or in any thing satisfactory: also, an action might be brought every day or every hour, as no time is limited when the rent should be paid; and the court was the more inclined to think it a void reservation, from its being on a *lease at will*, where the time of payment of the rent should be very certain, as the tenant by holding over a day must pay the rent of the next quarter.

4 Mod. 76.  
Salk. 262.  
pl. 2.  
2 Vent. 249.  
270. Parker  
v. Harris.

The services implied are such, as the law obliges the tenant to perform when there are none contracted for in the grant; and these are more or less according to the duration of the gift: as, at common law, before the statute *quia emptores terrarum*, if the tenant made a feoffment in fee without any reservation of services, the feoffee held by the same services by which the feoffor held over; because the services being by an incumbrance on the land, which the tenant could not discharge without his lord's consent, must follow the land into whose hands soever it comes.

Co. Lit.  
22, 23.

So, when after the statute *de donis* the feudal right of reverter was turned into a reversion in the feoffor, the law obliged the tenant in tail to do the same services to the donor, which he was obliged to by his superior lord; because this was an estate of inheritance which possibly might have continued for ever.

Lit. sect. 19.

Hence it is, that if *A.* seised of two acres, one holden of *B.* by knight's service, and 12 *d.* rent, and the other of *C.* in socage and 6 *d.* rent, makes a gift in tail of both acres, without any reservation, though the donor has but one reversion, yet the donee holds by two distinct tenures and different services, and pursuant to the tenure and the services, the avowry of the donor must be several; because the donee must hold as the donor held over.

Co. Lit. 23.

So, if there be lord, mesne and tenant, and the mesne hold by 12 *d.* rent, and the tenant by 4 *d.* the tenant make a gift in tail without any reservation, the donee shall hold by the 4 *d.* rent, because his donor holdeth of the mesne by that service; and if the donor die without issue, by which the reversion escheats to the mesne, then the donee must hold by 12 *d.* because his tenure is then of the mesne; and the tenant must hold by the same services by which his lord holds over.

Co. Lit. 23.

But the law did not make this construction on leases for lives or years, for if the lessor made no reservation, the law implied none, except fealty, which every tenant that has any determinate interest must do; because it is necessary there should be some *inducium* of the tenure, since all lands must be held of somebody.

Co. Lit. 23.

But since the statute *quia emptores terrarum*, if a man makes a feoffment in fee, or lease for life, or a gift in tail, remainder over in fee; the feoffee shall hold of the superior lord by the same services which the feoffor or donor held; for by that act the tenure upon such donations must be of the capital lord, and not of the feoffor; wherefore upon such grants there can be no rent-service

2 Inst. 503.

reserved at this day to the feoffor, because the feoffee is not obliged to swear fealty to him, inasmuch as he is not in his homage, and, consequently, not obliged to do any services to him for lands which he holds of the capital lord.

Lit. sect.  
214.

But since the statute, if a man makes a lease for life, or a gift in tail, saving the reversion to himself, with the reservation of rent or other services, this is a rent-service, for which the law gives the donor or lessor a remedy by distress, as before the statute; for neither the lessee nor donee is *feoffatus* within the act, because there is a reversion in the donor sufficient to support the tenure of him.

Lit. sect.  
215.  
7 Co. 24. 51.  
Cro. Eliz.  
656.  
Plow. 134.

Therefore in the case of a feoffment in fee, or lease for life, the remainder in fee; if the feoffor reserves a rent, such rent is seck, because it is unprofitable to the feoffor, he having no remedy for the recovery of it: the reason whereof is, because the land out of which the rent is reserved is not held of the feoffor, and, consequently, the feoffee is not obliged to the oath of fealty to him for lands which are held of another; and where there was no fealty due, there could be no seizure by the old law for non-performance of the services, and, consequently, no distress without the particular provision of the parties. And hence the true reason appears, why to a rent-service a power of distraining is inseparably incident by the common law, without any clause in the lease or provision of the parties.

## 2. Of a Rent-Charge.

Wile title  
Annuity.

Where a man seised of lands grants by a deed-poll or indenture a yearly rent, to be issuing out of the same land to another in fee, in tail, for life or years, with a clause of distress, this is a rent-charge, because the lands are charged with a distress by the express grant or provision of the parties, which otherwise they would not be.

Lit. sect.  
217.

So, if a man makes a feoffment in fee, reserving rent, and if the rent be behind, that it shall be lawful for him to distrain, this is a rent-charge, the word *reserving* amounting to a grant from the feoffee.

Lit. sect.  
251, 252.  
Co. Lit.  
170 a.  
Plowd. 134  
Gibb. Rents,  
19.  
So, if a rent  
be granted to

A rent granted for equality of partition by one coparcener to another is a rent-charge, and distrainable of common right without clause of distress; and although there be no tenure of the filter who grants it; for as the law for the conveniency of coparceners allows of such grants, it must consequently give a remedy to the grantee for the recovery of it.

a widow out of lands, whereof she is dowerable. Co. Lit. 169.

## 3. Of a Rent-Seck.

Lit. sect.  
215, 218.  
Cro. Eliz.  
666.  
[In what  
cases a rent-

A rent-seck is so called, because it is unprofitable to the grantee, as, before seisin had, he can have no remedy for recovery of it; as, where a man seised in fee grants a rent in fee for life or years, or, where a man makes a feoffment in fee or for life, remainder in

in fee, reserving rent without any clause of distress, these are rents-seck; for which, by the policy of the ancient law, there was no remedy, as there was no tenure between the grantor and grantee, or feoffor and feoffee, and consequently no fealty could be due.

seck may be distrained for, Keilw. 104. Co. Lit. 153. a. n. 3. 14th edit.] 7 Co. 24. b. Co. Lit. 147.

If a man grants a rent out of three acres, and grants over, that if the rent be arrear, that he shall distrain for the rent in one of the acres, this is one entire rent. but it cannot be a rent-charge for the whole, because the greatest part of the land out of which it issues is not chargeable with any distress for the recovery of it, and *denominatio sumenda à majori*; therefore it is taken to be a rent-seck, for which, by the words of the grant, the grantee may distrain in the third acre. For, whenever the remedy by way of charge for the rent is not commensurate to the rent, the rent is called seck, and the charge is only appurtenant or appendant to the rent, and does not give it its denomination. And the reason is, because if such original grant should be lost and worn out by time, and a man were to prescribe for it, if he were to give it the denomination of a charge, it would grasp more land than was originally intended to be charged; and therefore the law binds him down to the denomination of the rent as seck, and to set forth the charge as an appurtenant, that by length of time no more should be comprehended in the charge than was originally intended in the grant of that charge.

So it is, if a rent be granted to two and their heirs out of one acre, and that it shall be lawful for one of them and his heirs to distrain for it, this is a rent-seck, and the distress given to one is only an appurtenant to the rent. And this comes within the reason of the former case, because both the grantees have not a remedy by way of charge commensurate to the rent granted. But, if he to whom the distress was not limited dies, the survivor shall distrain, because the whole rent is then in him, and the remedy by distress, which was given to him and his heirs, ought in reason to be extended to the recovery of the whole estate given, and he is now in seisin of the whole rent under the first grant.

Co. Lit. 147. b. 7 Co. 24. b.

But, if a rent-seck be granted, and the grantee have seisin of the rent given to him, as by the payment of a penny, &c. and afterwards the grantee be disseised of it, or be denied payment, which is a disseisin in law, the grantee may, at common law, maintain an assise for it.

Lit. seft. 236. Cro. Jac. 142.

And it hath been ruled in equity, that where an annuity was devised by will to A., and the land subject to the annuity to B., that B. should give seisin of the rent-seck to A. that he might have remedy for the recovery of it at common law, it being the original intention of the gift, that the devisee should have some benefit from it.

Moor, 626. 3 Chan. Ca. 92.

So, when a bill was brought for  $\frac{3}{4}$  l. for a rent of 5 s. arrear for twelve years, the equity of the bill being that the deeds by which the rents were created were lost, and consequently no remedy for the rent at law; the court, upon the plaintiff's proving constant payment till the last twelve years, decreed the de-

Chan. Ca. 120. Collet v. Jaques.

pendant to pay the arrears and growing rent; for since by the payment it was evident the plaintiff had a right to the rent, and that he could not without his deeds make a title at law, therefore the court decreed the defendant to pay the rent, and so subjected his person, which possibly might not have been liable by the deed that created the rent.

And now by the 4 G. 2. *cap.* 28. it is enacted, "That all persons shall have like remedy by distress, and by impounding and selling the same in cases of rents-seck, rents of assise, and chief rents, which have been answered or paid for three years within the space of twenty years, before the first day of this session of parliament, or shall be hereafter created, as in case of rent reserved on a lease."

### (B) Out of what Things a Rent may issue.

Co. Lit. 47. a. 142. 2. **I**T is laid down as a general rule, that no rent can issue out of any incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress.

Cro. Jac. 679. (a) So, of a warren. Noy, 60. 3 Leon. 1. — As (a) a common was originally granted for the benefit of the beasts of every one of the tenants, and as the right of common which every man has runs through the whole common, and no particular tenant has a right to one part more than another, it follows that no (b) distress can be taken thereon, nor can the recognizors of the assise have the view of any particular part to which the grantee of the rent hath a right, and therefore cannot put him in seisin of the rent by a twig or a turf.

(b) Though a rent cannot, for the reasons herein mentioned, issue out of a common, yet by the 11 G. 2. c. 19. s. 8. it is enacted, that it shall be lawful for every landlord, his steward, bailiff, receiver, or other person empowered by him, to seize as a distress for rent any cattle or stock of their tenants feeding upon any common appendant or appurtenant, or any ways belonging to any part of the premises demised.

Bro. Assise, pl. 2. So, rent cannot issue out of a rent, for the statute of *Westm.* 2. (13 Ed. 1. *stat.* 1.) gives an assise *in certo loco capiendo*; but a rent cannot be put in view.

5 Co. 3. Cro. Jac. 111. 173. So it is of tithes, for a reservation of rent upon a lease of them is not good, because there is no place upon which the distress can be taken, nor any land to be put in view to the recognitors, or of which they may give him seisin.

Chan. Ca. 79. Thornside v. Alinton. Gilb. on Rents, 22. But it has been decreed in equity, that where a rent-charge of 20*l.* was devised out of a rectory, the glebe whereof amounted but to 40*s per annum*, that the whole rectory should be liable to the payment of the rent; and the proprietor of the rectory was decreed to pay the arrears of the rent and costs.

7 Co. 23. Noy, 60. Gilb. on Rents, 22. A rent cannot issue out of a hundred, fair, office, &c. for these were instituted for particular purposes, and are for publick utility. So of an advowson, in which the patron has no interest but to appoint an able and fit person to the church, without making any profit to himself.

But,

But, though a reversion or remainder be incorporeal, and can pass only by grant, yet a rent reserved upon a grant of them is good; for though the grantor has no remedy for them during the continuance of the particular estate, yet, since they relate to lands which were originally granted to make profit of, the judges have gone as far as they could to pursue the intention of such original donations, and therefore have admitted such reservations to be good immediately, since the lands in which the grantor had the reversion were originally given for that purpose, viz to make profit of. And this construction is the more reasonable, because in this case there is a remedy by distress for all the arrears, when the reversion executes by the determination of the particular estate, whereas there is no possibility of such remedy in the case of tithes, commons, fairs, &c.

So, and for the same reason it is, if the lord grants his seignory, reserving rent; for here is a prospect, though it be distant, of a remedy by distress upon the escheat of the tenancy.

So, if there be lord mesne and tenant, and the mesne make a gift in tail of the mesnalty, reserving rent, this is a good reservation, because the tenancy may escheat to the donee, and then the donor shall have remedy by distress for all the arrears.

Also, if a lease be made for years of an incorporeal inheritance, which lies only in grant, reserving rent, such reservation is good to bind the lessee by way of contract, for the non-performance of which the lessor shall have an action of debt because, if the lessee undertakes to pay such an annual sum by his deed, such undertaking gives the lessor a right to it, and the law in all cases gives remedies adequate and correspondent to every man's right.

As, when in covenant, for non-payment of rent, the plaintiff declared that he was seised of tithes, and by indenture demised them to the defendant, rendering rent, which he covenanted to pay, and for the non-payment thereof the plaintiff brought his action; the defendant having pleaded eviction, to which the plaintiff demurred; it was adjudged for the defendant; the court holding that this was rent, and that the eviction was a suspension of it, and therefore that the plea was good.

If a man makes a lease of *Blackacre* to commence *in futuro*, and of *Whiteacre* to begin *in presenti*, rendering rent, payable at *Michaelmas*, before the commencement of the term of *Blackacre*, this is a good reservation immediately, for it is but one entire rent, and as such is payable according to the reservation.

So it is, if a man grants a future interest in land, as, if it be a lease for years, to commence five years after the making of the lease, the lessor may reserve a rent immediately, because this is a good contract to oblige the lessee, and to ground an action of debt; and the lessor may likewise have his remedy by distress for the arrears when the lessee comes into possession.

A lease of the vesture or herbage of land, reserving rent, is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon.

Also,

10 E. 4. 4.  
Bro. title  
Distress, 47.  
Perk. sect.  
62.  
Co. 62.  
Capel's case.  
Co. Lit. 47.  
a. Gilb. on  
Rents, 24.

2 Roll. Abr.  
446.

Perk. sect.  
627. Cro.  
Eliz. 546.

5 Co. 3.  
Jewel's  
case. Cro.  
Jac. 452.  
2 Saund.  
303.  
Vent. 98.  
Lev. 308.

Ld. Raym.  
77. Dalton  
v. Reeve.  
Vide 5 G. 3.  
c. 17.

2 Roll. Rep.  
467. Fal-  
staff's case.

2 Roll. Abr.  
4-6. & vide  
2 Roll. Rep.  
407.  
Plow. 423.

Co. Lit. 47.

Co. Lit. 47.  
5 Co. 4. 56.  
Lane, 39.

Also, the king may reserve rent out of an incorporeal inheritance, because by his prerogative he may distrain in all the lands of his lessee for such rent; and therefore, since he has a remedy for the rent, there is no reason that such reservation should not be good.

1P. Wms.  
306.  
Attorney-  
General v.  
Mayor of  
Coventry.

But, if the king's tenant makes a lease of the lands not holden of the king, either for years or at will, the king cannot distrain such lands in the hands of the under-lessee. So, if they are extended on an *elegit*, or if they be under sequestration; but in this last case, upon application to the court of Chancery, liberty will be given to distrain without incurring any contempt of that court.

### (C) Upon what Conveyance a Rent-Service may be reserved.

10 E. 4. 3.  
21 H. 5. S.  
Co. Lit. 144.  
193.  
2 Roll. Abr.  
449.  
Gilb. on  
Rents, 26.

**H**ERE it may be laid down as a rule, that a rent-service may be reserved upon every conveyance that passes any estate to the tenant, or enlarges an estate already in him; for the rent being an annual return by way of retribution for something given, it follows, that where no estate passes by the conveyance, there ought to be no retribution or return. Besides, the thing given was anciently in nature of a pledge for the rent, and therefore ought to be such that the giver might formerly have re-vested himself in, and now may have recourse to for a distress upon non-payment of the rent. Hence therefore it is, that if the disseisor releases all his right to the disseisor, reserving rent, the reservation is void.

Id. 27.  
Lit. sect.  
438.  
Dyer, 230.  
Mo. 631.  
13 Co. 55.

So it is, if there be lord and tenant, and the tenant hold of his lord by fealty and 20 s. rent, and the lord release to his tenant, or confirm his estate in the tenancy, yielding to him a hawk or rose yearly, this new reservation is void, because there is no estate given to the tenant, for which he should make that new return of service to his lord. But the lord upon such release or confirmation may confirm the tenant's estate to hold by less services, as in this case by fealty and 5 s. rent, because, by the same reason that he may release his feignory, he may likewise abridge himself of part of it.

Gib. on  
Rents, 27.  
10 E. 4. 3.  
Co. Lit.  
193. b.  
2 Roll. Abr.  
449.

If there be tenant for life, and he in reversion release to him in tail, reserving rent, the reservation is good, because the tenant's estate is enlarged by the release, and therefore the rent reserved ought to be paid in return for the inheritance given, and the lessor has immediate remedy by distress for recovery of it. So, upon a surrender by deed, rent may be reserved.

13 Co. 55.  
Samme's  
case. Co.  
Lit. 193.

So, if the lord of a manor, by indenture at common law, releases to his copyholder in fee, to him and his heirs, or confirms such lands to his copyholder and his heirs, reserving a rent, this reservation is good, because the release or confirmation enure by way of *mitter le estate*, to pass an estate at common law to him, where before he had but a copyhold or customary estate at will. But upon a release or confirmation, which enures by way of *mitter le droit*, no rent can be reserved; and in the other case, though the reservation,



reservation, be it by indenture or deed-poll, be good, yet, without clause of distress, it is only a rent-seck.

So, upon a release that enures by way of *mitter le estate*, as when one joint-tenant releases to another, a rent may be reserved. But *quære*, if such release carries the fee-simple, whether such rent be a rent-service, inasmuch as the releasee being in from the first feoffor, there can be no tenure of the releasor and consequently the rent must be seck, unless there be a clause of distress in the deed of release; for so it is in the case of a feoffment in fee since the statute *quia emptores terrarum*, as is before observed.

At common law no rent could have been reserved upon a bargain and sale, because only a use passed, which was not any estate to which the bargainor could have recourse for a distress; but now by the statute 27 H. 8. c. 10. the possession is executed to the use, and therefore the bargainor may now have recourse to the land for a distress.

There can be no rent reserved upon any conveyance, that enures by way of extinguishment of the estate of the grantor, because in such case there is no reversion left in him to create a tenure; and therefore, if a lessee surrenders his estate, reserving a rent, the reservation is not good. But this case put by *Rolle* must, it seems, be understood of a lease for life; for such a reservation may be good by way of contract, upon a surrender of a lease for years; for when the lessor takes an assignment or surrender of the lessee's term, he agrees to take it under such a yearly rent; and such agreement or contract is a good foundation for an action of debt, if it be not performed, whether the agreement be by deed or parol.

So, if a rent be reserved upon a feoffment in fee, though the feoffor hath no reversion, yet this is a rent, and recoverable by the name of rent upon the contract.

[A rent cannot be reserved on a fine *sur cognizance de droit come ceo*, or on any other fine which is executed: but, if an estate for life only be conveyed by the fine, the cognisor may reserve a rent with a clause of distress.]

## (D) By what Words a Rent may be reserved or created.

**A** Rent-service being something in retribution for the land that passes, it must be reserved by such words as imply a return of something that was not in the grantor before, in lieu of the land given; and therefore *reddendo, reservando, solvendo, faciendo, inveniendo*, and such like, are proper words by which a rent may be reserved.

But, if a man makes a lease of lands, except *12d.* or *prater 12d.* rent, these are no good reservations, because these words are only proper to reserve to the lessor part of something in being, which would otherwise pass by the lease.

Co. Lit. 123.  
Gilb. on  
Rents, 28.

2 Inst. 673.  
2 Co. 54.  
Co. Lit. 144.  
a. Cro.  
Eliz. 595.  
Gilb. on  
Rents, 28.

2 Roll. Abr.  
449. but see  
Alen. 57.  
Gilb. on  
Rents, 29.  
2 Lev. 80.  
Raym. 222.  
2 Mod. 174.  
Winton v.  
Pinkney,  
and Lutw.  
364.  
Ld. Raym.  
82. Sir John  
Brownlow v.  
Hewley.

Carth. 162.

Ero. Abr.  
tit. Fines,  
p. 30. Roll.  
Abr. tit.  
Fine, O.  
p. 10.

Co. Lit. 47. a.  
Perk. sect.  
625  
Prow. 142.  
2 Roll. Abr.  
440. Gilb.  
on Rents, 30.

Perk. sect.  
639.

2 Roll. Abr.  
449.

So it is, if a man makes a lease, *salvo* or saving 20s. rent, this is no good reservation, because there can be no saving of any thing not in being; consequently, a rent-service being a return of something not in the lessor, in lieu of the land given, cannot be reserved by words, that, in their most extended signification, can only preserve something already *in esse*.

Perk. sect.  
650.

But, if there be lord and tenant by knight's service, and the tenant make a gift in tail, to hold by a penny, *salvo forinfeco servitio*, that is, saving to the tenant such service by which he held the land of his lord; this is good to make the donee hold by knight's service; for though the tenant had not that service in himself, before the gift, yet it was a service in being, for the tenant was obliged to do it to his lord; and therefore it is but reasonable that he might save that service to himself which he was at the time of the gift obliged to perform to another.

2 Roll. Abr.  
449.

So it is, if there be lord, mesne, and tenant, and the mesne hold by knight's service, and the tenant by socage; if the tenant make a gift in tail reserving rent, and saving the knight's service the donee in this case likewise shall hold by knight's service; because this service was in being and chargeable upon the land at the time of the gift, though the tenant was not obliged to it himself, and therefore may be reasonably saved to him who parts with the land upon which it was before chargeable: and the rather, because such construction is most beneficial to the publick, and the donee not injured; because he willingly takes it under such charge.

Moor, 459.  
Cro. Eliz.  
486. Har-  
rington v.  
Wife.

By articles of agreement indented between *A.* and *B.* it is covenanted and agreed, that *A.* doth let *Blackacre* to *B.* for five years from *Michaelmas* following; provided always, that *B.* shall pay at *Michaelmas* and *Lady-day* 10l. by even portions yearly. This *proviso* is a good reservation of the rent; for as the words amounted to an immediate demise of the lands; so the rent, which is but a retribution for the land, ought to be paid immediately; and it cannot be construed to be a sum in gross, because by the words of the articles (which being indented are the words of both the parties) it is to be paid yearly.

Plov. 131.  
Cro. Car.  
207.  
Roll. Rep.  
80. Cro.  
Jac. 298  
2 Bull. 281.  
Jon. 251.  
Hardr. 325.  
Co. Lit. 47.  
a. n. 7.  
14th edit.

If lands be leased to *A.* and he covenant and grant to render and pay for the said lands every year, during the said term, to the lessor, his heirs and assigns, 10l.; this amounts to a reservation. So it is, if the lessor covenant that the lessee shall hold and enjoy the land, and the lessee *in consideration premissorum* covenant to pay to the lessor, his heirs and assigns, an annual rent of 10l. during the term: for here the rent is plainly given as a retribution for the land which the lessee holds; and this being by indenture, the words are looked upon to be spoken by both parties, and these may reasonably be construed, that the lessor, in consideration of the land demised, reserves the rent agreed on by way of retribution or return: and therefore it has been adjudged, that such rent goes with the reversion to the heir; and the executor of the lessor shall never recover it by way of covenant.

## (E) How several Rents may be reserved in the same Deed.

HERE the difference is to be observed between a rent reserved entire in the *reddendum*, upon a demise of several things in the same lease (for there, though the rent be after apportioned to the particular parcels leased, yet the reservation shall be taken as one and entire); and where the rent is not at first reserved entire, but upon the reservation is several and apportioned to the several things demised. For instance, if a lease be made of several houses, rendering the annual rent of 5*l.* at the two usual feasts, *viz.* for one house 3*l.* for another 10*s.* and for the rest of the houses the residue of the said rent of 5*l.* with a clause of re-entry into all the houses for non-payment of any parcel of the rent; this is but one reservation of one entire rent; because all the houses were leased, and the 5*l.* was reserved as one entire rent for them all, and the *viz.* after does not alter the nature of the reservation, but only declares the value of each house.

But, if the lease had been of three houses, rendering for one house 3*l.* for another 20*s.* and for the third 20*s.* with a condition to re-enter in all for the non-payment of any parcel, these are three several reservations, and in the nature of three distinct demises, for which the avowries must likewise be several; for each house in this case is only chargeable with its own rent, the entire sum not being at first reserved out of all the houses demised, and afterwards apportioned to the several houses, according to their respective value, as in the former cases; but the particular sums are at first reserved out of the several houses; and therefore the non-payment of the rent of one house can be no cause of entry into another.

So, if the lord had reserved out of one house 3*l.* during five years, and 20*s.* out of another house during ten years; and 20*s.* out of the third house to commence ten years after, these are distinct reservations and several demises; and each house is subject to a distress but for its own rent.

Tenant in tail demised the site and demesnes of a manor which had accustomedly been let, and also all the manor, and all lands and tenements belonging to it; *habendum* the said site and demesnes, and also the said manor and premises for twenty-one years; yielding and paying for the said site and demesnes 10*s.* and yielding for the said manor and premises 20*s.* This was adjudged a good lease for the site and demesnes which had been accustomedly let; but for the other parts of the manor not usually let the lease was void\*; and the whole lease was not held to be void, because that these were several reservations, and so in nature of several leases.

If a lease be made of two manors, *habendum* one manor for 20*s.* and the other manor for 10*s.* these are several reservations, and each manor is charged with its respective rent.

Hob. 172.  
5 Co. 54.  
Moor, 51.  
199.  
Knight's  
case. Gilb.  
on Rents, 34.

Dyer, 309.  
5 Co. 55.  
Moor, 98.  
Winter's  
case.

5 Co. 55.  
2 Roll. Abr.  
448.

Cro. Eliz.  
341.  
Tanfield v.  
Rogers.

\* It was  
void by  
32 H. 8.  
c. 28. § 2.  
4 Leon. 30.

10 Co. 106.  
Hob. 276.  
Humphrey  
Lofield's  
case.

*A.* made a lease of a cellar for a year, and if at the end of the year the parties should agree that the demise should continue, then to have and to hold the same for three years, *reddendo inde annuatim durante dicto termino* 40s. this is one entire reservation as well for the first year as for the three years; for the words *dicto termino* extend to both terms indifferently.

Moor, 202.

And as there may be several reservations in the same lease by the words of the parties, so there may be by act of law; as, where a lease for life is made to an abbot or bishop in their public capacities, and to *J. S.* reserving a rent, the lessees are not joint-tenants but tenants in common; and therefore the reservation of the rent must be several, and the reversion, to which the rent is incident, must follow the nature of the particular estates on which it depends, and therefore must be several too.

Lit. sect.

314. Co.  
Lit. 107. a.  
Moor, 202.

So it is, if there be two tenants in common, and they make a lease for life, rendering rent, this reservation though made by joint words, shall follow the nature of the reversion, which is several in the lessors, and therefore they shall be put to their several assises if they be disseised, as if there had been distinct reservations. But, if the reservation had been of a horse or hawk, which is not in its nature severable, then for the necessity of the case the law admits them to join in one assise.

## (F) Of the Days of Payment.

Gillb. on  
Rents, 48.  
Hob. 172.  
Co. Lit. 217.  
Plow. 171.  
2 Blownl.  
221.

THESE are either by the particular appointment of the parties in the deed, or by appointment of law in default thereof. And here it is regularly true, that the law will never controul the express appointment of the parties, where such appointment will answer their intention; but, though there be particular days mentioned in the deed for the payment of the rent, yet, if the manner of such appointment will not fully answer the design of the contract, the law in such case will alter or transpose the words of the deed; because it is the great end of the law to execute all contracts, however unwarily or inartificially framed, according to the purport and true intention of the parties upon the whole deed. Thus for instance, If *A.* makes a lease to *B.* the 6th of *August*, rendering yearly the rent of 40s. at the two feasts of the year, *viz.* at *Lady-day* and *Michaelmas*, by equal portions; though in this case by the appointment of the parties *Lady-day* be the first term mentioned, yet the first payment shall be made at *Michaelmas* ensuing the date of the lease; for without such (a) transposition the intention of the parties could never be fulfilled; because the rent is reserved annually, and the lessor would lose the profits of one half-year, if the rent was not payable at the first *Michaelmas*; for then the lessee must enjoy the land from the date of the lease to the first *Michaelmas*, without paying any thing; and so likewise from the last *Lady-day* of the term to the expiration of it; because though the lease ended in *August*, yet the payment was not to be made till *Michaelmas*, before which the lease expires.

(a) That the law will marshal the payments.  
2 Roll. Rep. 213.  
5 Co. 112.  
3 Bulst. 328.  
2 Jo. 109.

If

If a man makes a lease the first day of *May*, reserving rent payable quarterly; this shall be intended quarterly from the making of the lease, for if the beginning of the quarter should be construed to be any other day than the date of the lease, the lessor would lose the profits of his land for some time, and, consequently, not have a quarterly payment during the continuance of the lease; [or the lessee would be obliged to pay a quarter's rent before he had received a quarter's profits of the lands.]

2 Roll. Abr.  
450.  
Gilb. on  
Rents, 50.

If a lease be made for years, provided that the lessee shall pay for it at *Michaelmas* and *Lady-day* 10*l.* by even portions during the term; though this rent be not made payable yearly, yet the law construes it to be so, because it is payable at the two feasts during the term; and then, consequently, it must be paid yearly, because, if there be an omission of the payments any one year during the lease, it is not paid at the two feasts during the term.

2 Roll. Abr.  
449.

If a lease for years be made, rendering rent at the four feasts, without saying yearly, yet this shall be construed to be yearly during the term.

Sid. 316.

So, if the rent had been payable yearly, without saying during the term, yet the payment must be made every year during the continuance of the lease.

Moor, 459.

A lease reserving rent *pro quolibet anno* is all one as if it had been made payable annually, and then it is to be paid at the end of every year.

Lutw. 231.

A (a) rent generally reserved is payable at the end of the year, but, (b) if rent be reserved *annuatim durante termino predicto*, the first payment to begin two years after, this controuls the words of reservation. So (c), if a rent is made payable yearly, during the time the lessee shall enjoy the land, the lessor cannot demand this rent half-yearly, but must wait to the end of the year.

(a) Latch,  
264.  
(b) 3 Bullt.  
329.  
(c) Lit. Rep.  
61.  
Helt. 53.

If a man grants a rent of 10*l.* to another, payable at the two usual feasts of the year, this shall be intended by equal portions, though it be not so mentioned in the deed; because where there are two several days appointed for the payment, it is the most equal construction that a moiety of the rent shall be paid at each day.

2 Roll. Abr.  
450.  
Noy, 18.

And if a lease be made, rendering rent at the two usual feasts in the year, without specifying what feasts in certain, the law construes such payments to be at *Michaelmas* and *Lady-day*; because these are the usual days appointed in contracts of this nature for such payments.

2 Roll. Abr.  
450.  
2 And. 122.

Lessee for life made a lease for twenty years if he so long lived, reserving yearly, during the term, 10*l.* at *Michaelmas* and *Lady-day* by equal portions, or within thirteen weeks after every of the said feasts. If the lessor dies after *Michaelmas* and within the thirteen weeks, there is no rent due for the last half-year; because the lessee has election in this case either to pay the rent at *Michaelmas*, or at any time during the thirteen weeks; and if it be not paid at *Michaelmas*, it is then the same as if the rent had been made payable thirteen weeks after *Michaelmas* only; and, consequently, the lessor dying, and the lease thereby determining before the rent became due, the lessee shall not be obliged to make any return or

10 Co. 127.  
Clun's case.  
Cro. Jac.  
310. 500.  
Cro. Eliz.  
380. 565.  
575.  
4 Leon. 247.

retri-

\* At the death of tenant for life retribution for a thing he has not enjoyed to the day he was to make the retribution\*.

a proportionable part of the rent shall be paid to the executors. 11 G. 2. c. 19. § 15.

Cro. Jac.  
227. 233.  
Yelv. 167.  
Brownl.  
105.  
2 Brownl.  
220.  
Bulst. 1.  
Barwick  
v. Foster.

But, if tenant in fee makes a lease for years to begin at *Michaelmas*, rendering 100*l.* per annum at *Michaelmas* and *Lady-day*, or within ten days after every feast, it seems, by the better opinion, that the rent is due the last *Michaelmas-day* of the term, without any regard to the ten days; for the reservation being annually at the two feasts, or within ten days, it shall be construed at the end of every ten days during the term, as most agreeable to the design of the contract; and therefore the law rejects the ten days after the last feast, because the term ending at *Michaelmas*, there cannot be ten days after it during the term for payment of the rent. And this construction is the more reasonable, because to give the lessee his election to make the last payment either at *Michaelmas* or within the ten days, as in the former case, were to put it in his power to avoid the payment of the last half-year's rent; for if it were construed not to be due till the end of the ten days, the lessor could never oblige him to pay it, because then the term would be ended before the rent became due; but the addition of the ten days was only to enlarge the time of payment, not to prevent the payment, or to remit any part of the rents.

M. 27 Car. 2.  
in B. R.  
Biggon v.  
Bridge.  
3 Keb. 534.  
S. C.

Debt upon an obligation, condition that whereas the plaintiff had demised to the defendant all the tithes of *W.*, which if the defendant shall peaceably enjoy from 20 *February* 1661, *usque* or until *Michaelmas* 1668, the said defendant paying every half-year the sum of 30*l.* viz. on the 29th day of *September* and *Lady-day*, or twenty-one days after each feast during the term, that then, &c. and breach was assigned in non-payment of the rent at *Michaelmas* 1668, to which the defendant demurs, because the enjoyment being to be *usque* or until *Michaelmas* 1668, this excludes *Michaelmas-day*; and so the term is ended before *Michaelmas* 1668, and then no rent can be due at *Michaelmas*. But the court were clearly of opinion, that *Michaelmas-day* in this case was to be taken inclusively; and *Hale* cited the Earl of *Northumberland's* case, who declared on a demise at will, rendering rent at *Michaelmas* and *Lady-day*, and declared that the defendant enjoyed the land *usque festum Sancti Michaelis*, and demanded rent due at *Michaelmas*; and there it was moved that *usque festum* excludes the feast; and therefore the will being determined before the feast, the rent was not due: but it was there ruled that *usque* included the day. And they said, that agreements were not to have such constructions as pleadings, but to be taken according to the intent of the parties, and being *usque* such a day, the day ought to be commenced before the time is come. And they agreed that the reservation during the term goes to both feasts, viz. 20 *February* 1661, and *Michaelmas* 1668, and that the word *usque* shall be taken inclusively; for without such construction no rent would be then due, because the term would be ended before *Michaelmas*; and they relied upon the case in (a) *Leon*, and though

(a) 3 Leon.  
211.



though there be election given to pay on the said days, or twenty-one days after, yet this is not material when the last feast comes, for then it was absolutely due on that day; and though (a) *Cro. Eliz.* and *Yelv.* seem contrary, yet they were not regarded, for otherwise the lessor would lose the last quarter.

In debt for rent the plaintiff declared on a demise, bearing date the 25 Aug. 11 W. 3. for seven years from the 24 June before, paying quarterly at the four most usual feasts in the year, or within twenty-one days after each of the said feasts, 3*l.* 10*s.*; the first payment to be made at *Michaelmas* next ensuing the demise, &c.; and further declared that 1*l.* of the said rent was in arrear for one year ended the 24 December, 13 W. 3.; for which, &c. to which the defendant demurred; and it was objected, that the year did not end the 24 December, but at *St. Thomas's* day, according to the *reddendum*, which is 21 December; which the court admitted, and held, that where special days of payment are limited by the *reddendum*, the rent must be computed according to the *reddendum*, and not according to the *habendum*; and that the computation of the rent, according to the *habendum*, is only when the *reddendum* is general, viz. yielding and paying quarterly so much rent.

(a) *Cro. Eliz.*  
702.  
*Yelv.* 74.  
*Umble v.*  
*Fisher.*

2 *Ld Raym.*  
419.  
*Salk.* 141.  
pl. 7.  
7 *Mod.* 96.  
*Tomkyns*  
*v. Pinient.*

## (G) To whom Rents may be reserved or granted.

HERE *Littleton's* text is to be laid down as a sure rule, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, donor, lessor, or to their heirs, and in no manner may it be reserved to any stranger. And the reason of the rule is, because the rent is something paid by way of retribution for the land, and therefore can only be made to him from whom the land passes. Besides, the reservation to a stranger was prohibited to avoid the danger of maintenance; for if that was allowable, persons might make reservations to powerful men, who might extort more from the tenant than was originally contracted for.

*Gilb. on*  
*Rents,* 54.  
*Lit. sect.*  
346. *Co.*  
*Lit.* 47. a.  
143. b.

Hence it is, that the king has been excepted out of the rule, and allowed to make the reservation of the rent to a stranger, because there could be no danger of maintenance in this case, there being no person so great and powerful in the kingdom as the king himself, who parted with the land.

*Mod.* 162.  
*Co. Lit.* 143.  
2 *Roll. Abr.*  
447.

But, where the king made a lease of a house belonging to his housekeeper of *Whitehall*, reserving a rent to the housekeeper for the time being; though in this case it was admitted that the king might reserve rent to a stranger, yet it being here made to an officer who was removeable at will, the reservation was held ill.

*Ld. Raym.*  
36.

If *A.* enfeoff *B.* upon condition that *B.* and his heirs shall render to *C.* and his heirs a yearly rent of 10*s.*, and if he fail of payment, that it shall be lawful for *A.* and his heirs to re-enter; this is not in nature of any sort of rent, but a sum in gross, which the feoffee is obliged to pay, to prevent the re-entry of the feoffor; for at common

*Lit. sect.*  
345.

law, before the statute of *quia emptores*, it could not be good as a rent-service, because nothing passed from *C.* for which a retribution ought to be made; nor can it be good by way of rent-charge, because *C.* hath no remedy given him by the deed to charge the land with it, or otherwise to recover it; nor is it a rent-seck, because though it should be once paid to *C.* and he thereby have seisin of it, yet he shall never have an assise for the recovery of it, because the penalty by the deed is a re-entry to *H.* and his heirs, which for ever determines it.

**Co. Lit. 213.** But, if *A.* and *C.* in this case had joined in a feoffment of the land by deed, reserving rent to them both and to their heirs, and the feoffee had granted that it should be lawful for them and their heirs to distrain for the rent, this had been a good grant of a rent-charge to them both, because *C.* being party to the deed has a remedy by distress for the recovery of it; and when the feoffee empowers *C.* to distrain on the land, such grant always supposes that the distress, which is in nature of a pledge, shall remain in the person's hands to whom it is given, till it be redeemed by the payment of the thing for which it was originally taken.

**Cro. Car.**  
288.  
**Jon.** 308.  
**2 Roll. Abr.**  
450. **Bland**  
**v. Inman.**  
**2 Saund.**  
360.

But, where the husband, possessed of a term for years in his own right, joins with his wife in an assignment of the term, reserving rent to him and his wife, and the survivor of them, if they shall so long live; and if the rent be arrear, that it shall be lawful for them and the survivor of them, and for the assigns of the survivor, to re-enter, but the wife neither sealed nor delivered the deed; this rent determined by the death of the husband, for it could be no good reservation to the wife, because she had no interest in the land to part with, and therefore could have no rent-service reserved to her by way of retribution for a thing she never had in her to part with; nor can this amount to a grant of a rent-charge to her, as in the former case of the feoffment it did to *C.*, because here the wife, having never sealed and delivered the deed, could be no party to it; and there does not appear to have been any clause of distress limited to the wife by this deed, as there was to *C.* by the deed of feoffment, and consequently it could not be good as a charge upon the land. Nor is it good as a rent-seck in her, because issuing out of the term for years it must, in its nature, be a chattel interest, for which no assise lies, which is the only remedy after seisin for the recovery of the rent-seck. Nor could the executor of the husband be entitled to the rent, though it was limited to them and the survivor of them, and the assigns of the survivor, during the term, because the reservation to the wife was evidently intended to create an interest and right in her to the rent, and therefore shall not be taken as words of limitation against the original design of them.

**Hob.** 130.  
**2 Roll. Abr.**  
447. **Lit.**  
**100. 346.**  
**5 wife Co.**  
**Lit.** 99. b.  
213. a.

If a man makes a lease for years, reserving rent to his heirs, or makes a lease to commence after his own death, reserving rent, this is a rent-service arising in the heir, not by way of new purchase of such rent, but as incident to the reversion descending to the heir, and therefore may be released by the ancestor during his

his life, which it could not be if it were a new purchase in the heir. And so it is, if the rent were reserved upon a lease for life or gift in tail. The reason is, because the reversion descends from the ancestor to such heir, and the rent-service is incident to such reversion, and this may as well be as a man that hath an estate in land may grant such original charges.

Hard. 90.  
93.

But, if the reservation had been made to his son, though he happened afterwards to be heir, such reservation is void; for it cannot be good by way of rent-service, because the son has not the reversion to which the rent is incident at the time of the lease made; and if the son dies before the rent commences, it may go to a different person than the reversion, which belongs to the heir of the father; and such reservation cannot be good by way of new grant, because the word *reservation* will not import a new grant, unless it be made to the person from whom such interest moves.

Hob. 130.  
Oates v.  
Fryth.  
2 Roll. Abr.  
447.  
2 Sand. 370.

If an original grant be made of a rent, to commence after the death of *J. S.*, this is good; for this is not like the case of lands, where the livery must carry the freehold immediately, and where the abeyance or want of distinguishing where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, a man that had brought his *præcipe* against the grantor, after he had proceeded in it a considerable time, might have his writ abated by the freehold's vesting in a stranger, by reason of a conveyance made by the grantor before the writ brought; but the grant of a rent *de novo* is not attended with this inconvenience, for no man can have a precedent right to a thing which is originally created by the grant itself. Yet *quære* at what distance of time such charges may be allowed to commence, whether it must not be after the lives of the persons *in esse*, for if they be indefinite, they seem to tend to a perpetuity?

Bro. title  
Grant, 86.  
8 H. 7. 2.  
Plow. 156.  
Palm. 29.  
2 Vent. 204.

But a rent *in esse*, or already created, cannot be granted to commence after the death of *J. S.*, because to such rents there may be precedent titles, and therefore such grants are not good; for such freeholds, by thus being split and severed, do hide the person in whom the right is, and therefore the party that has right will not be able to discern against whom to bring his *præcipe* for the recovery of it.

Bro. title  
Grant, 86.  
Plow. 156.

If *A.* covenants and grants with *B.* that he shall have and enjoy *Blackacre* for six years, and *B.* covenants to pay *A.*, his heirs, executors, and administrators, an annual rent during the term; this, being a good reservation of a rent, shall, upon the death of *A.*, be paid to his heir who has the reversion, as a retribution for the profits of the land which he cannot enjoy during the term; and the executors of *A.* shall never have any thing by virtue of the covenant, though it is in express words granted to *A.* and his executors.

Cro. Car.  
207. Drake  
v. Mundy.

So, if *A.* makes a lease, reserving rent to him and his executors and assigns, and dies, this rent is determined, for the executors cannot have it for the former reason, being strangers to the reversion, which is an inheritance; and therefore, being never to enjoy

Co. Lit. 47.  
2 Roll. Abr.  
450.

the profits of the land after the expiration of the term, can never have a right to a retribution or compensation for them.

Mo. 51.  
Eyre's case.  
Dyer, 221.

If a bishop leases for years, reserving rent; *proviso quod tempore vacationis dicti episcopatus redditus prædicti secundum ratam temporis solvetur capitulo ecclesie cathedralis dicti episcopatus*, with a clause of re-entry to the successor for non-payment of rent to the chapter, this is a void proviso; for the chapter being never to come into the succession of the land belonging to the see, can have no right to a return of service from the lessee.

2 Roll. Abr.  
447.  
Co. Lit. 47.  
Vent. 161.

If there be two joint-tenants, and they make a lease by parol or deed-poll, reserving rent to one only, yet it shall enure to both; but, if the lease had been by deed indented, the reservation should have been good to him only to whom it was made, and the other should have taken nothing. The reason of the difference is this; where the lease is by deed-poll or parol, the rent shall follow the reversion, which is jointly in both lessors; and the rather, because the rent being something in retribution for the land given, the joint-tenant to whom it is reserved ought to be seised of it in the same manner he was of the land demised, which was equally for the benefit of his companion as himself; but, where the lease is by deed indented, they are esopped to claim the rent in any other manner than it is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from or vary his own solemn act.

## (H) Of the Continuance of the Rent, and to whom to be paid; and herein, of the distinct Interests of the Heir and Executor of the Lessor.

Co. Lit. 47.  
a.  
2 Rol. Abr.  
289. 450.  
Dyer, 45.  
Hard. 95.

**H**ERE, first, is observable the difference between a general reservation, without mentioning any person in certain to whom the rent shall be paid, and a particular reservation to the lessor without mentioning any other person to whom it shall be paid. For where the reservation is general, the rent shall be carried over to the person who should have succeeded to the estate, if no lease had been made; but, where the reservation is particular, as to the lessor, without going further, there, the rent shall determine with his death, though the lease, upon which it is reserved, be still continuing: as, if *A.* makes a lease for years, reserving a certain rent, without saying *to the lessor or his heirs*, yet this general reservation shall carry the rent not only to the lessor, but even to his heirs that succeed in the reversion, because the rent is reserved as a retribution or compensation for the land demised, and therefore ought, from the nature of the contract, to be of equal duration with the demise. But, if *A.* had made a lease, reserving a certain rent to himself, he has thereby determined how long the reservation shall continue, and therefore it shall never be carried further than the period of time the lessor himself has fixed it.

12 Co. 35.  
Hatch, 274.  
Co. Lit. 47.

So, if a lease had been made by *A.*, yielding and paying to him and his assigns yearly the rent of 10 s.; this rent shall likewise

wife determine by his death, and his heirs shall never have it, because there are no words to carry it to the heir who is to have the reversion; and the lessor having expressly limited it to himself, has thereby determined it to his own life, for his assigns cannot have it longer than the lessor himself should have had it; and these words, *his assigns*, cannot enlarge the reservation; for if he had assigned over the reversion, the rent by his own death had determined; *secus*, if he had reserved it, *during the term*.

Cro. Car.  
290.  
Vent. 162.  
2 Lev. 13.  
Mod. 216.

So, if the reservation had been made to the lessor and his executors, or to him, his executors and assigns; in these cases, the rent determines with the life of the lessor, because the executor cannot take the rent; for that if it be continued beyond the life of the lessor, it must be carried over to him who is to succeed in the estate, and that is the heir at law; but the heir cannot take in these cases, because there are no words in the deed to carry it to him.

2 Rol. Abr.  
450.  
Co. Lit. 47.

If *A.* makes a lease, reserving rent to him or his heirs, this is a good reservation during the life of *A.*, but void as to his heirs, because the reservation being to him *or* his heirs in the disjunctive, both cannot take it; and the word *heirs* cannot be words of limitation, because, if they are to take at all they must take originally; for if the rent vests in the lessor, it cannot afterwards go to the heirs, for that would be contrary to the words of the reservation, which limited the rent either to the lessor *or* his heirs, but not to both of them.

Co. Lit. 214.  
5 Co. 112.  
Vent. 163.

But it hath been adjudged, that where an abbot made a lease, rendering rent to him or his successor during the term, that this reservation was good to the successor after the death of the lessor, because here the rent by express words is made payable *during the continuance of the term*, and therefore as an incident to the reversion must go in succession with the inheritance; and therefore the successor of the abbot or assignee of the reversion must necessarily have it; for the rent being but a retribution for the land, none can have a right to it but those who would have succeeded in the estate, if the land for which the retribution is given had never been leased.

5 Co. 111.  
Mallory's  
case. Cro.  
Eliz. 805.  
832. Vent.  
146. 163.

If tenant in special tail leases for years, reserving rent to him, his heirs and assigns, this rent shall go with the reversion to the special heir in tail, though it be reserved to the heirs generally; for the word *heir* shall be taken in that sense that will best answer the nature of the contract, which is, that those who would have succeeded in the estate, if the lease had never been made, shall enjoy the rent, which is the retribution given for the want of the land during the lease.

Hard. 89.  
Vent. 163.

If there be tenant for life with several remainders over, so settled by limitation of uses, with a power to tenant for life to make leases, who makes a lease, reserving rent to him, his heirs and assigns; this is a good reservation, and shall go to those in remainder: for when the tenant for life makes a lease, pursuant to such power given to him by the settlement, such lessee derives his estate out of the inheritance, which before the settlement was in the tenant for life; and the settlement being by construction of

3 Co. 69.  
Whitlock's  
case.  
1 Anderf.  
273.  
Co. Lit. 214.  
n. r. 14th  
edit.

law subsequent to the estate of the lessee, those in remainder to the tenant for life are his assignees, to whom the rent by the express words of the lease is reserved and limited after the death of the tenant for life.

8 Co. 71. So, if the reservation had been in this case to the lessor, and every person to whom the reversion and inheritance of the land belongs during the term, this would be a good reservation to those in remainder, and the law would, in such case, distribute the rent according to the several interests under the settlement. But my Lord *Cole* says, the surest way is for the tenant for life to reserve the rent annually *during the term*, and then the law disposes of it as an incident to the reversion.

Co. Lit. 12. If a man seised of land on the part of his mother, makes a lease or a gift in tail, reserving rent to him and his heirs, this rent shall go with the reversion to the heirs on the part of the mother, because the nature of the contract is such, that the retribution should go to those who lose the profit of the land during the gift or lease.

Co. Lit. 12. But, if he had made a feoffment in fee, reserving rent to him and his heirs, the rent would go to the heir on the part of the father, because here is an entire disposition of the land, and the rent is in nature of a new purchase coming into the family from the grant of the feoffee, and therefore the blood of the father shall be preferred.

Vent. 167. If a man possessed of a term for one hundred years makes a lease for fifty years, reserving rent to him and his heirs, this rent determines with his death; for the heir cannot have it, because he cannot succeed in the estate (being a chattel interest), to which the rent, if it continues after the death of the lessor, must belong; and the executors cannot have it, because there are no words to carry it to them\*.

\* *Vide infra.*

Latch, 99, 100, *Sury v. Brown*. But, if a man, seised of land in fee, makes a lease for years, reserving rent to him and his assigns *during the term*, this reservation shall not determine by the death of the lessor, but the rent shall go to his heir; for though there be no mention of the heirs in the reservation, yet there are words that evidently declare the intention of the lessor, that the payment of the rent shall be of equal duration with the lease, the lessor having expressly provided that it shall be paid during the term, and, consequently, the rent must be carried over to the heir, who comes into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made. And if the lessor assigns over his reversion, the assignee shall have the rent as incident to it, because the rent is to continue during the term, and therefore must follow the reversion, since the lessor made no particular disposition of it separate from the reversion.

5 Co. 112. *Cro. Eliz.* 217. If a lease be made for years, reserving rent during the term, to the lessor, his executors and assigns, this, by the judgment of *Richmond* and *Butcher's* case, determines upon the death of the lessor, and does not go to the heir. But this judgment hath been

(a) 2 Saund. 367. since overthrown by the authority of the case of (a) *Sacheverell v. Frogate*,

*Frogate*, because the reservation being to the lessor and his assigns during the term, (for the words *executors* and *administrators* are void, the lessor having the inheritance,) such express words evidently discover the intent of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise.

2 Lev. 13.  
Raym. 213.  
Vent 161.  
Sacheverell  
v. Frogate.

So, and for the same reason, if a termor for fifty years leases for twenty-five years, reserving rent to him and his heirs *during the term*, the executors shall have the rent after the death of the lessor.

Vent. 162.

If *A.* grants a rent-charge to *B.* for forty years, with a clause of distress to *B.* and his heirs during the term, the executor of *B.* may distress for it during the term; for the distress is expressly given during the term, and therefore must belong to the executor who has a right to the rent-charge, being a chattel interest.

Cro. Car.  
64.  
Darrel v.  
Willson.

*A.* tenant for three lives, to him and his heirs, assigned over his whole estate to *B.* and his heirs, reserving a rent of 10*l.* a year to the assignor, his executors, administrators, and assigns, with a proviso, that upon non-payment the assignor and his heirs might re-enter, and the assignee covenanted to pay the rent to *A.*, his executors and administrators: the question was, Whether this rent should go to the heir or executor of the assignor? And it was decreed in equity that it should go to the executor, as the rent was reserved to him, and as there was no reversion left in the assignor to which the rent could be incident, so as to carry it to the heir. It was also held, that the covenant to pay the rent to the executor and administrator of the assignor was good and binding both in law and equity; and though the proviso was, that in case of non-payment of the rent the assignor and his heirs might re-enter, yet the court thought this immaterial, as in equity the heir, in this case, must be looked upon as a trustee for the executor.

1 P. Wms.  
555. Sir  
Matth. Jen-  
nison v.  
Lord Lex-  
ington.

If a lease be made, reserving rent at *Michaelmas*, or ten days after; the rent be not paid at *Michaelmas*, and, before the ten days are expired, the lessor die; the heir, and not the executor, shall have the rent; for though it was in the election of the lessee to pay the rent at *Michaelmas*, yet the ten days after are the true legal term, so that the rent was not legally due before that time, and therefore no chattel. So, if the lessor die on the day on which the rent is to be paid, after sunset, and before midnight, the heir, and not the executor, shall have the rent; for it is not due till the utmost limit of the day, which ends not till twelve o'clock, though the time for demanding it for convenience be a convenient time before the sun sets\*.

10 Co. 127.  
Clun's case.  
Cro. Jac.  
309. Cro.  
Eliz. 575.  
Mo. pl.  
1012.  
Yelv. 167.  
Saund. 287.  
[2 Bl. Rep.  
1077.]

\* *Vide post.*

*A.* pursuant to a power in his marriage-settlement made leases of several parts of his estate which were settled on his wife, reserving rent payable at *Lady-day* and *Michaelmas*, and died upon *Michaelmas-day* between three and four in the afternoon, and before sunset, leaving *B.* his executor one of the tenants paid *A.* his rent, being 18*l.*, the morning of the day on which he died; and the question was, as to the arrears due from all the tenants,

Lord Rock-  
ingham v.  
Pentice,  
1 P. Wms.  
177.  
2 Salk. 578.  
S. C.

whether, they should go to the jointress as incident to the reversion, or to *B.* the executor? And it was decreed by the Master of the Rolls, on the authority of *Clun's* case, that they should go to the jointress, being incident to the reversion, to which the heir would be entitled in case there had been no jointress; but that as to the 18*l.* rent paid by one of the tenants to the lessor upon *Michaelmas-day* in the morning on which the lessor died, his Honour held this to be a good payment as to the lessee who paid it, and that he should not be compelled to pay it over again, but that *B.* the executor, to whose hands it came, should pay and account for it to the jointress.

1 P. Wms.  
173. Cole  
v. Bellasis.

—From a  
note of Jus-  
tice Tracy,  
who said he  
had consult-  
ed the Chief  
Justice Holt on the point, and that upon consideration of all the cases he was of the same  
opinion.

Preced.

Chan. 555.  
Earl of  
Strafford v.  
Lady Went-  
worth.

1 P. Wms.  
180. S. C.  
cited.

But, where *A.* granted a rent-charge to *B.* for life, payable at *Lady-day* and *Michaelmas*, and *B.* died on *Michaelmas-day* after sunset; it was held by Judge Tracy, at *Durham* assizes, that as *B.* lived till after sunset, which was the legal time for demanding the rent, though he died before twelve at night, that it should go to the executors.

*A.* tenant for life, remainder to his wife for life, &c. makes a lease at will, reserving rent at *Lady day* and *Michaelmas*, and died on *Michaelmas-day* about twelve o'clock at noon: it was held in this case, that his administrator was entitled to this rent. And herein the court took a difference betwixt a rent incident to a reversion that must go somewhere, (if not to the executor, then to the heir,) and where the rent was to go nowhere, unless to the executor; that in the latter case if the lessor lived to the beginning of that day, at which time a voluntary payment of the rent might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than it should be lost; for it would be strange if the tenant should pay the rent to nobody; and in this case the person in remainder (*viz.* the wife) can have no pretence to the rent, it being a lease at will, and, consequently, such as could have no continuance with respect to her.

1 P. Wms.  
372. Jenner  
v. Morgan.

*A.* tenant for life, remainder to *B.* his son in tail, *A.* being in debt and his estate extended, the creditor made a lease to *J. S.* reserving 160*l.* a year payable quarterly; *A.* died the 10th of *March*, and *J. S.* continued the possession till after the *Lady-day* next following; whereupon *B.* claimed the whole rent from *Christmas* to *Lady-day*; but the court held, that as to the rent from *Christmas* to the 10th of *March* it was a gift in law to the tenant, not provided against by any of the acts of parliament; and that there could be no remedy as to any apportionment in point of (a) time either in law or equity.

(a) Salk.  
65. pl. 1.

But now by the 11 *Geo. 2. cap. 19. § 15.* "Where any tenant for life shall die before or on the day on which any rent was reserved, upon any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole; or if before such day, then a proportion of such rent, according to the time such tenant for life



“ life lived of the last year, or quarter, or other time in  
 “ which the said rent was growing due, making all just allow-  
 “ ances.”

[Where a tenant in tail granted a lease not warranted by the statute, and died without issue a week before the day of payment of the half-year's rent, and the lessee afterwards paid all that half-year's rent to the remainder-man, Lord *Hardwicke* held the executors of the tenant in tail entitled to the rent to the day of his death; for as the lessee had submitted to pay it, but had paid it to one who had no right to it, the person to whom it was so paid should be accountable, and considered as receiving it to the use of those who were in equity entitled to it.

Paget v.  
 Gee,  
 1 Burn's  
 Just. tit.  
 Distress,  
 § 17.  
 Ambli. 198.

Where tenants from year to year under demises from a testamentary guardian of an infant tenant in tail, who died without issue between the days of payment, had paid the whole of the rent to receivers, Lord *Thurlow* directed such part of it as had accrued due in the lifetime of the tenant in tail to be paid to his personal representative, for that the tenants holding from year to year, or from period to period, from a guardian without lease or covenant, could not be allowed to raise an implication in their own favour that they should hold without paying rent to any body. These two cases were decided independently on the statute of 11 G. 2. though Lord *Hardwicke* strongly inclined to think that a tenant in tail was within it: a tenant in tail after possibility of issue extinct, and a tenant for years determinable upon lives, he thought, were clearly within it.

Vernon v.  
 Vernon,  
 2 Br. Ch.  
 Rep. 659.

Where money to be laid out in the purchase of land is vested in government securities, and the interest and dividends are directed to go in the mean time as the land would, in that case if the tenant for life die between the days of payment of the half-yearly dividends, his executors are not entitled to a proportional share thereof to the time of his death, but the remainder-man takes the whole.]

Sherrard v.  
 Sherrard,  
 3 Atk. 502.  
 Wilton v.  
 Harman,  
 2 Vez. 672.  
 Ambli. 279.  
 Rashleigh  
 v. Matters,  
 3 Br. Ch.

Rep. 99. Pearly v. Smith, 3 Atk. 260. In this last case, the money had been originally secured by mortgage, but by order of the court had been transferred to government securities.

## (I) Of the Recovery and Demand of the Rent: And herein,

### 1. In what Cases a Demand is necessary.

**H**ERE the material difference is between a remedy by re-entry, and a remedy by distress, for the non-payment of the rent; for where the remedy is by way of re-entry for non-payment, there must be an actual demand made previous to the entry, otherwise it is tortious; because such condition of re-entry is in derogation of the grant, and the estate at law being once defeated is not to be restored by any subsequent payment; and it is presumed that the tenant is there residing on the premises in order to pay the rent for the preservation of his estate, unless the contrary

Co. Lit.  
 201. b.  
 Hob. 207.  
 331.  
 5 Co. 56.  
 Dyer, 51.  
 Plow. 70.  
 7 Co. 56.  
 Maund's  
 case.  
 Vaugh. 32.

trary appears by the lessor's being there to demand it; and therefore unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land ready to pay the rent, the law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear without a demand hath been actually made on the land.

Hutt. 114.  
Hob. 207.  
331.  
7 Co. 56. So, if a *nomine pene* be given to the lessor for non-payment, the lessor must demand the rent before he can be entitled to the penalty; or, if the clause be, that if the rent be behind, that the estate of the lessee shall cease and be void; in these cases, there must be an actual demand made, because the presumption is, that the lessee is attendant on the land to save his penalty and preserve his estate, and therefore shall not be punished without a wilful default; and that cannot be made appear without a demand be proved, and that it was not answered. And the demand in these cases must be made at the day prefixed for the payment, and alleged expressly to have been made in the pleading.

Hob. 207.  
Hutt. 13.  
23.  
Moor, 883.  
2 Roll. Abr.  
426. But, where the remedy for the recovery of the rent is by distress, there needs no demand previous to the distress; though the deed says, that if the rent be behind, being lawfully demanded, the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the rent becomes due. So it is, if a rent-charge be granted to *A.*, and if it be behind, being lawfully demanded, that then *A.* shall distrain; he may distrain without any previous demand, because this remedy is not in destruction of the estate, for the distress is only a pledge for the payment of it, and the very taking of the distress is a legal demand of the tenant to pay the rent, which was all that was required by the deed; and the tenant is not injured by the taking of the distress, because, upon the tender of the rent, the pledges are immediately to be restored, or a writ of *detinue* lies after the *quantum* of the rent has been settled in a replevin; whereas in the case of re-entry, or of the penalty, the tenant is really injured either by the loss of his estate, or the payment of a greater sum than the rent, which cannot be restored upon the payment of the rent; and therefore he shall not be punished in such cases without a wilful default in him, which cannot otherwise appear than by the proof of a demand, which was not answered by the tenant.

But this general distinction must be understood with these restrictions:

5 Co. 56.  
4 Co. 73.  
Latch, 28.  
Moor, 152.  
Dyer, 87, 88. First, That if the king makes a lease, reserving rent with a clause of re-entry for non-payment, he is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay his rent for the preservation of his estate, because it is beneath the king to attend his subject to demand his rent. [If lands of a subject, whereon rent is reserved, with a condition of re-entry, come to the king, he may, by reason of his prerogative, take advantage of the condition without demand, though the subject could not. 5 Co. 56. a. b.]

Moor, 149.  
160.  
Feun, 's But this exception is not to be extended to the duchy lands, though they be in the hands of the king, for the king must make a de-

a demand before he can re-enter into such lands : but this is by the 1 H. 4. which provides, that, when the duchy lands come to the king, they shall not be under such government and regulations as the demefnes and poffeffions belonging to the crown.

So, if a prebendary make a lease, rendering rent, and if the rent be arrear and be demanded, that it shall be lawful for the prebendary to re-enter ; if the reversion in this case come to the king, the king must in this case demand the rent, though he shall be by his prerogative excused of an implied demand ; for the implied demand is the act of the law, the other the exprefs agreement of the parties, which the king's prerogative shall not defeat ; therefore in case of the king, if he make a lease, reserving rent, with a *proviso*, that if the rent be in arrear for such a time, (being lawfully demanded, or demanded in due form,) that then the lease shall be void ; it seems, that not only the patentee of the reversion in this case, but also the king himself, whilst he continues the reversion in his own hands, is obliged to make an actual demand by reason of the exprefs agreement for that purpose.

But, if the king, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment, without a previous demand, because the privilege is inseparably annexed to the person of the king.

Secondly, Another exception is, where the rent is payable at a place off the land, with a clause, that if the rent be behind, being lawfully demanded at the place off the land, or with a clause, that if the rent be behind, being lawfully demanded of the person that is to pay it, that then he may distrain ; in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a previous demand ; because here the distress and demand being not one complicate, but different acts, to be performed at different places and times, the demand must be previous to the distress ; for the distress is a matter of agreement between the parties, not of common right, and therefore must be used in the manner that it is given.

But, where the clause is no more, than that if the rents be behind, being lawfully demanded, (without saying at any place off the land, or of the person of the grantor,) that then the grantee may distrain, there needs no actual demand, because here the distress and demand is but one complicate act, the one included in the other, and all done at one time and place, *viz.* upon the land ; for the distress is in itself a lawful demand, and therefore there needs no actual demand previous to it ; because all that was required by the deed was a lawful demand, which the distress in its own nature is.

And there seems to have been formerly another exception admitted, that where the remedy was by way of entry for non-payment, that yet there needed no demand, if the rent were made payable at any place off the land ; because they looked upon the money payable off the land to be in nature of a sum in gross, which the tenant had at his own peril undertaken to pay. But this opinion has been entirely exploded, for the place of payment does not

Dyer, 87.  
210.

4 Co. 73.  
Moor, 404.  
Cro. Eliz.  
462.  
Dyer, 87.

Hob 208.  
2 Roll. Abr.  
426.  
Moor, 883.  
Brownl. 171.  
Et vide  
Hutt. 23.  
cont.

2 Roll. Abr.  
426.  
Hob. 208.  
Et vide  
Dyer, 343.

Plow. 70.  
4 Co. 73.  
Moor, 408.  
508. Cro.  
Eliz. 425.  
433. 536.

not change or alter the nature of the service, but it remains in its nature a rent, as much as if it had been made payable upon the land; and therefore the presumption is, that the tenant was there to pay it, unless it be overthrown by the proof of a demand, and without such demand, and a neglect or refusal thereupon, there is no injury to the lessor, and, consequently, the estate of the lessee ought not to be defeated.

Dyer, 63.

But, when the power of re-entry is given to the lessor for non-payment, without any further demand, there, it seems, that the lessee has undertaken to pay it, whether it be demanded or not; and there can be no presumption in his favour in this case; because, by dispensing with the demand, he has put himself under the necessity of making an actual proof that he was ready to tender and pay the rent.

Hob. 207.  
2 Roll. Abr.  
427.

There is another exception when the remedy is by distress, and that is, when the tenant was ready on the land to pay the rent at the day, and made a tender of it; there, it seems, there must be a demand previous to the distress, because where the tenant has shewn himself ready on the day by the tender, he has done all that in reason can be required of him; for it would put the tenant to endless trouble to oblige him every day to make a tender; it being altogether uncertain when the lessor will come for his rent, when he has omitted to receive it the day which he himself has appointed by the lease for payment and receipt; wherefore as the lessee must expect the lessor, and be ready to pay it at the day appointed for the payment of it, else the lessor may distrain for it without any demand; so, where the lessor has lapsed the day of payment, and was not on the land to receive it, he must give the tenant notice to pay it before he can distrain for it; for the tenant shall be put to no trouble where it appears that he has omitted nothing on his part.

Hob. 207.

And where the tender is made by the tenant on the land at the day, there, a demand on the land is sufficient to justify a distress after the day; because the demand in such case is of equal notoriety with the tender, and by a parity of reason the tenant ought to take notice of such demand, as well as the lessor of the tender on the land.

Hob. 207.  
2 Roll. Abr.  
427.

But, if the tenant had tendered the rent on the day to the person of the lessor, and he refused, it seems, by the better opinion, that the lessor cannot distrain for that rent, without a demand of the person of the tenant; because the demand ought to be equally notorious to the tenant as the tender was to the lessor.

Hutt. 13.  
Hob. 207.

So, if the services by which the tenant holds be personal, as homage, fealty, &c. the demand must be of the person of the tenant, because this service is only performable by the very person of the tenant; and therefore a demand, where he is not, would be improper.

Cro. Car.  
508.  
7 Co. 29. a.  
Hob. 207.  
2 Roll. Abr.  
427.

Again, if the rent be seck, and the tenant be ready at the last instant of the day of payment to pay the rent, and the grantor be not there to receive it, he must afterwards demand it of the person of the tenant on the lands before he can have his assise; because

cause the tenant, by the tender at the day, has done all that was required on his part; and, if the grantee might have his assise, after such tender on the day, without a demand of the person, the tenant might be made a disseisor, and damages for the disseisin laid upon him, without any wilful default in him. But, in the case of a rent-charge, after such tender of the tenant on the land, the grantee may afterwards demand the rent on the land, because he has his remedy by distress, which is no more than a pledge for the rent, and this being to be found, and taken on the land, the grantee need only demand his rent, where he can find his remedy, which is on the land. But in this case, if the grantee cannot find the tenant on the land to demand the rent, he may, on the next feast on which the rent is payable, demand all the arrears on the land; and if the tenant is not there to pay it, he has failed of his duty, and is guilty of a wilful default, which amounts to a denial; and that denial being a disseisin of the rent, the grantee may have his assise, and by that shall recover all the arrears.

But, if there has been neither a tender of the rent, nor a demand of the grantee on the day, there, the grantee may afterwards demand the rent on the land; because, the tenant having omitted to do his duty by a tender on the day, he is still obliged to answer the legal demand of the grantee, which is well made upon the land, because the rent issues thereout; for, where there is no tender on the day of payment, the rent is due and payable every day afterwards; and therefore a demand in the same manner as the law requires is sufficient; and, consequently, the non-payment, after a demand on the land, is a denial and disseisin, for which the grantee may have his assise.

Lit. sect.  
233.  
7 Co. 29.  
2 Roll. Abr.  
427.

If a lease be made reserving rent, and a bond given for performance of covenants and payment of the rent, the lessor may sue the bond without demanding the rent; for the bond, being only a collateral security for the rent, makes no alteration in the nature of it; but it must still be paid in the same manner, and at the same time and place, as if there had been no bond given; and therefore is subject to the former rules and distinctions as to the demand.

Cro. Eliz.  
332. Cro.  
Car. 76.  
Hob. 8.

If there be several things demised in one lease, with several reservations, with a clause, that, if the several yearly rents reserved be behind or unpaid in part, or in all, by the space of one month after any of the days on which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premises whereupon such rents being behind are reserved, to re-enter; these are in the nature of distinct demises, and several reservations; and, consequently, there must be distinct demands on each demise to defeat the whole estate demised.

Vaugh. 71,  
72.

Also, as to the necessity of a demand of the rents, there is a difference between a condition and a limitation. For instance, if tenant for life (as the case was by marriage settlement with power to make leases for twenty-one years, so long as the lessee, his ex-

Vaugh. 31,  
32.  
Tristram v.  
Countess of  
Balsinglaff.

ecutors

ecutors or assigns shall duly pay the rent reserved) makes a lease pursuant to the power; the tenant is at his peril obliged to pay the rent without any demand of the lessor; because the estate is limited to continue only so long as the rent is paid; and, therefore, for the non-performance according to the limitation, the estate must determine; as if an estate be made to a woman *dum sola fuerit*, this is a word of limitation which determines her estate upon her marriage.

Hob. 331.  
2 Roll. Abr.  
429.  
2 Mod. 264.

Note—It seems the better way for the lessor to have a clause of re-entry for non-payment of the rent, than a clause that the lease shall be void for non-payment; because, in the case of a re-entry, a demand by the lessor and non-payment by the lessee does not avoid the lease; because there must be an actual entry to determine it, to which, as it is said, there must be an actual demand precedent; so that in this case an actual demand does not determine the lease, but only puts it in the power of the lessor to avoid it; and this being discretionary in the lessor, he may either recover the rent by action of debt, and so suffer the lease to continue; or after such actual demand he may by entry defeat it. But, if the clause be, that for non-payment the lease shall be void, then, if the lessor should unadvisedly make an actual demand of the rent, and the lessee not be able at that time to pay it, he has hereby actually determined the lease; because there is no re-entry previous to determine an estate already void in itself: yet, even in this case, if the lessor forbears to make an actual demand when the rent is in arrear, he may recover it by action of debt or distress, and so continue the lease, because, these remedies being not in defeasance of the grant, the lessor may pursue them without an actual demand. But this observation is to be intended only of a lease for years; for in case of a lease for life no demand can determine it without actual entry, though the clause be, that for non-payment of the rent the lease shall cease and be void.

3 Co. 64.  
Pennant's  
case.

Dyer, 87,  
88.

One makes a lease for years, rendering rent, payable at the two most usual feasts in the year, or within a month after each of the said feasts, at such a place certain, with a proviso, that if the rent be arrear by the space of a month after either of the said days (being demanded in due form) that then the lease shall be void. If the lessee does not pay the rent at the feast-day, but some time after within the month makes a tender of it at the place appointed, it is doubted if this be sufficient without a tender at the last instant of the last day of the month; but it seems not, because the lessor might have been there on the last instant of that day to have demanded it, and then for non-payment the lease will be void, and, consequently, such tender before the last instant cannot save it.

Noy, 145.

*Nicolls* prayed the opinion of the court in this case: lessee of tithes (without any barn or soil) rendering rent, with a proviso, that if the rent be not paid, the lease should be void, whether the lessor should be obliged to seek the lessee and demand the rent of him, or that the lessee ought to seek the lessor? And it was held

held that the lessee ought to seek the lessor, and that so it had been ruled before that time, as at the peril of the lessee the rent must be paid, otherwise the lease is gone.

## 2. The Time of Demand.

The time for payment of rent, and, consequently, for a demand, is such a convenient time before the sun-setting of the last day, as will be sufficient to have the money counted : but, if the tenant meet the lessor on the land at any time of the last day of payment, and tender the rent, that is a sufficient tender, because the money is to be paid indefinitely on that day, and therefore a tender on the day is sufficient.

If a lease is made, rendering rent at *Michaelmas* between the hours of one and five in the afternoon, with a clause of re-entry, and the (a) lessor comes at the day about two in the afternoon, and continues to five, this is (b) sufficient.

be by attorney. 4 Leon. 179.—But the power must be special, for such land of such tenant. Brownl. 138. (b) Demand must be proved by witnesses. Dyer, 68.—must be made of the precise sum due. Leon. 305. Sav. 121. Mo. 207.

Co. Lit.  
202. a.  
Dalst. 44.  
And. 253.  
Sav. 121.  
4 Leon. 171.  
Saund. 287.

Cro. Eliz.  
15. Lord  
Cromwell v.  
Andrews.  
(a) The de-  
mand may

Yelv. 37.  
of the precise

If a lease be made, reserving rent, upon condition that if the rent be behind at the day, and ten days after, (being in the mean time demanded,) and no distress to be found upon the land, that the lessor may re-enter; if the rent be behind at the day and ten days after, and a sufficient distress be upon the land till the afternoon of the tenth day, and then the lessee take away his cattle, and the lessor demand the rent at the last hour of the day, and the lessee do not pay it, nor is there any distress upon the land; yet the lessor cannot enter, because he made no demand in the mean time between the day of payment and the ten days, which by the clause he was obliged to do.

Cro. Eliz.  
63.  
Worcester v.  
Stone.

## 3. The Place where the Demand is to be made.

Here again we must observe the difference between a remedy by re-entry and distress; for when the rent is reserved, upon condition that if it be behind, that the lessor may re-enter, in such case the demand must be upon the most notorious place on the land; and therefore, if there be a house upon the land, the demand must be at the fore door thereof, because the tenant is presumed to be there residing, and the demand being required to give notice to the tenant that he may not be turned out of possession without a wilful default, such demand ought to be in the place where the end and intention will be best answered.

And it seems the better opinion, that it is not necessary to enter the house, though the doors be open, because that is a place appropriated for the peculiar use of the inhabitant, into which no person is permitted to enter without his permission; and it is reasonable that the lessor shall go no further to demand his rent, than the tenant shall be obliged to go, when he is bound to tender

Co. Lit.  
153, 201.  
2 Roll. Abr.  
428.

Dalst. 59.  
Co. Lit.  
201.  
And. 27.  
3 Leon. 4.  
E wide  
Cro. Eliz.  
15.

it;

it; and a tender by the tenant at the door of the house of the lessor is sufficient, though it be open, without entering; and therefore by a parity of reason a demand by the lessor at the door of the tenant, without entering, is sufficient.

**Co. Lit.** But, when the demand is only in order for a distress, there, it  
**253.** is sufficient, if it be made on any notorious part of the land, because this is only to entitle him to his remedy for his rent; and therefore, the whole land being equally the debtor, and chargeable with the rent, a demand upon it, without going to any particular part of it, is sufficient.

**Co. Lit.** If a wood be let, reserving rent, the demand ought to be made  
**202.** at the gate, or some highway leading through the wood, as the most notorious place.

**Bendl. 59.** If a rent-sock be granted out of *A.* payable at *B.*, the grantee  
**Cro. Eliz.** may demand it at *A.*; and if the tenant be not there to pay it, it  
**324.** is a disseisin, for which the grantee may have his assise; and a  
**Cro. Car.** demand at *B.* had likewise been good, because that, by the ex-  
**507.** press appointment and agreement of the parties, was the place where the rent was made payable.

**Cro. Car.** But a demand of the person of the tenant is not sufficient off  
**521.** the land, because the demand is required to be made in order to  
**Co. Lit. 153.** an immediate payment; but no person is presumed to carry his wealth about with him; that is reasonably supposed to be at his place of habitation, or upon the land from whence it is gathered, and therefore, the demand of the person off the land, being not sufficient to answer the intention of the demand, is useless and insignificant.

**4 Co. 73.** If the king makes a lease, reserving rent, the tenant must pay  
**Co. Lit. 201.** it without demand, as is said, either to his receiver for that pur-  
**Cro. Eliz.** pose, or at the receipt of the Exchequer, as well as if by the  
**462.** words of the lease the rent had been made payable at his Exche-  
**Mod. 404.** quer, or into the hands of his receiver. But, if the king grants  
**Dyer, 87.** the reversion, the patentee must demand the rent upon the land, because that is the place appointed by law, for the reasons already given, for a common person to demand the rent.

**2 Roll. Abr.** If a rent be reserved, payable at the church of *S.* or *D.* upon  
**428.** condition, it ought to be demanded at both places, because the lessee hath his election to pay it at either place; and therefore, to take advantage of the condition, the lessor must demand it in such places where by his own agreement he has permitted the tenant to pay it.

**2 Roll. Abr.** So, if it had been reserved to be paid at or in the church of *D.*,  
**428.** it ought for the same reason to be demanded both within and without the church.

**Dyer, 329.** If a lease be made of two barns, rendering rent, with condi-  
**in margin.** tion of re-entry for non-payment, the lessee tender the rent at one barn, and the lessor demand it at the other, yet the lessor cannot re-enter, because one barn being as notorious, and, consequently, as proper a place as the other for the payment, it is presumed that the lessee was at the proper place for payment, unless that presumption be overthrown by a demand; and therefore since the demand



demand was not made at both the barns, there is nothing to destroy the presumption that the tenant was at the proper place ready to pay to save the condition; and if the lessor did not demand it at the proper place, he shall not take advantage of the condition.

But, however just and reasonable the above cases and distinctions might have been, and however necessary the knowledge of them, yet now,

By the 4 G. 2. c. 28. § 2. it is enacted, "That in all cases between landlord and tenant, as often as one half-year's rent shall be in arrear, and the landlord hath right by law to re-enter for non-payment, such landlord may without any formal demand or re-entry serve a declaration in ejectment (a); or, in case the same cannot be legally served, or no tenant be in actual possession of the premises (b), affix the same upon the door of any demised messuage, or upon some notorious place of the lands, &c. comprised in such declaration, which service or affixing such declaration shall stand instead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the declaration was served, and no sufficient distress was to be found, and that the lessor in ejectment had power to re-enter, the lessor in ejectment shall recover judgment and execution in the same manner, as if the rent in arrear had been legally demanded, and re-entry made; and in case the lessee, or other person claiming under the lease, shall suffer judgment to be recovered on such ejectment, and execution executed, without paying the rent and arrears, with costs, and without filing any bill for relief in equity within six calendar months after execution executed, the said lessee and all persons claiming under the lease shall be barred from all relief in law or equity, other than by writ of error, provided that nothing herein shall bar the right of any mortgagee of such lease who shall not be in possession, so as such mortgagee within six calendar months after execution executed pay all rent in arrear, and costs and damages, and perform all covenants and agreements on the part of the first lessee."

[(a) The meaning of the act is, that where there is no express stipulation in the lease for entry without demand, the lessor may, notwithstanding, enter without demand, provided six months' rent is in arrear, and there is not a sufficient distress; otherwise, in such cases, a demand must be made. Doug. 469. Goodright *ex dim.* Hare v. Cator. — Acceptance of rent by the landlord after the lease has been forfeited, has been held to be a waiver of

the forfeiture in ejectments brought upon this act; for it is a penalty, and by accepting the rent, the penalty is waived. *Per Aston, J.* Cowp. 247. (b) A very little matter is sufficient to keep the possession; therefore where the defendant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment and execution were set aside with costs. Bull. N. 1. ri. 97. 4th edit. *Savage v. Dent.*]

[If the lessee, his assignee, or any other person, claiming any right, title, or interest at law or in equity to the lease, shall, within the time aforesaid, file one or more bill or bills for relief, in any court of equity, he shall not have or continue any injunction, against the proceedings at law on such ejectment, unless he shall, within forty days next after a full and perfect answer shall be filed by the lessor of the plaintiff in such ejectment, bring into court,

and lodge with the proper officer, such sum and sums of money as the lessor of the plaintiff shall in his answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case the bill shall be filed within the time aforesaid, and after execution executed, the lessor of the plaintiff shall be accountable for no more than he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if that happen to be less than the rent reserved on the lease, then the lessee, before he shall be restored to his possession, shall pay to the lessor or landlord what the money he so made fell short of the reserved rent, for the time he held the lands.

§ 4. Provided that if the tenant shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into court where the cause is depending (a), all the rent and arrears, together with the costs, all further proceedings on the said ejectment shall cease and be discontinued; and if the lessee, his executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he and they shall hold the demised lands according to the lease thereof made, without any new lease to be thereof made to him or them.]

Other title. (a) This had been permitted antecedently to the passing of this act, where the court were satisfied, that the ejectment was brought upon no other title, than a re-entry for the non-payment of rent. 2 Salk. 597. 2 Str. 900. Andr. 347. It is now permitted too in other actions besides ejectment, where the object is the recovery of rent; as, in replevin, 1 H. Bl. 24. in covenant, 1 Will. 75. in debt for rent, and assumpsit for use and occupation, Barnes, 118. Mr. Reg. C. P. 257. 1 Barr. 578. And upon payment of the rent and costs, the court will stay the proceedings in ejectment, notwithstanding judgment has been obtained. 8 Mod. 345. 2 Str. 900.

## (K) The several Remedies for the Recovery of Rents: And herein,

### 1. Of the Remedy by Distress.

**T**HE remedy by distress is by the common law incident to a rent-service; but in case of a rent-charge, it must be expressly provided for by the deed.\*

\* The executors of tenants in fee simple, &c. of rents, shall have debt or distress for the arrears. 32 H. 8. c. 57. — Exceptions of mayors in Wales. *Id.* c. 2. — Husband's seisin in right of wives, or tenants *per auter vie*, after the death of the wife, or *cessui que vi*, may distress or have debt for the arrears. *Id.* c. 3. — Distress given for rent-secks, [rents of assise, and chief-rents which have been duly paid for the space of three years within the space of twenty years before the first day of the session of parliament when the statute passed; or shall hereafter be created, as in case of rent reserved upon lease. 4 G. 2. c. 28. s. 5. For a rent granted in fee since the statute of *quâ emporior*, and before the passing of this statute, there cannot be a distress but under this statute, and therefore in an assumpsit for such a distress, the case must be brought within it. Dougl. 604. Braubury v. Wright.] — Crops growing may be distrained, 11 G. 2. c. 19. s. 8. — Goods liable to distress not to be taken in execution without paying the arrears, not exceeding one year's rent. 8 Ann. c. 11. — On this last statute the following cases have been determined: If the money be levied by sale of goods taken in execution against defendant, who was a tenant owing rent, after the landlord's death intestate, and before administration granted, the court will not order the sheriff to pay the year's rent to the administrator afterwards. Waring v. Dewberry, Str. 97. — A landlord is obliged to demand the arrears before the removal of the goods, or it is too late. *Ibid.* Fort. 567. Darling v. Hill. Ca. temp. Hardw. 255. — An executor or administrator has the same benefit of the act as the landlord, for it is an interest vested. Chace v. Chace, Fort. 350.

Palgrave

*Palgrave v. Windham*, Str. 212. If goods are seized on an extent on an outlawry, the landlord shall not have the goods delivered to him, though he distrains before the extent. *Rex v. Southerly*, Bunb. 5. [It is settled, that goods distrained for rent and not sold, are liable to seizure on an immediate extent for the king's own debt; for the mere distress does not change the property. *Parker*, 112. *Rex v. Cotton*. Whilst goods are upon the premises the landlord may distrain them, notwithstanding an actual assignment under a commission of bankrupt. 1 Atk. 103. *ex parte Plummer*. But, if the goods are carried off the premises, or sold, he loses his lien upon them. 1 Atk. 104. *ex parte Grove*. 1 Co. Bankrupt Laws, 221. *ex parte Davine*. So he does, if the goods are replevied, and the lessee afterwards, and before any proceedings in replevin, becomes bankrupt, and the assignees sell the goods. *Bradyll v. Fall*, 1 Br. Ch. Rep. 427. Where a trader, after committing an act of bankruptcy, takes a shop and agrees to pay half a year's rent in advance, where by the custom of the country so much becomes due on the day on which the tenant enters, the landlord after an assignment under the commission, and before the expiration of the half year, may distrain the goods on the premises for half a year's rent. *Buckley assignee of Buckley v. Taylor*, 2 Term Rep. 600.]—\*\* The landlord is to have his year's rent without any deduction for sheriff's poundage. *Gore v. Goston*, Str. 643.—The ground landlord of a house is not entitled to a year's rent on an execution against an under-lessee. *Bennet's case*, Str. 787.—On an outlawry, *capias utlagatum*, and goods seized by process still remaining in the sheriff's hands, the landlord shall have a year's rent. *Greaves v. D'Acaistro*, Bunb. 194.—If ex-rent issues against a tenant, and afterwards, but before the extent is executed, the landlord distrains, and the inquisition finds the goods distrained to be in the possession of the tenant, the landlord shall not have the benefit of the Stat. 8 Ann. *Rex v. Pritchard*, Bunb. 269.—When there are two executions, the landlord shall not have a year's rent on each. *Semb. Dod v. Saxby*, Str. 1024.—*A.* lets land to *B.* at 75 *l.* per annum for one year; a few days before the end *B.* says he can hold it no longer, but desires as much as will feed sixteen cows; which *A.* complies with, and demises also the house and garden; some months after *B.*'s goods are taken in execution, no part of the rent of 75 *l.* being paid; *A.* shall not have the 75 *l.* on motion, and *finis*. no rent under the act, though he proceed by action. *Cook v. Cook*, Andr. 247.—On an execution for costs on judgment of nonsuit, sheriff cannot, after he has received notice of rent due, remove the goods before he has satisfied the landlord one year's rent; unless the rent be paid, sheriff must quit; if he does not, an action lies against him; or, on motion, the court will order restitution to the amount of the goods sold, deducting costs incurred before notice. *Henchett v. Kempson*, 2 Wils. 140.—A bill of sale held to amount to a removal of goods taken by *fieri facias*, and the sheriff shall pay the year's rent out of the money levied. *Barnes*, 211.\*\*

This remedy by distress is greatly enlarged by several acts of parliament, which are taken notice of under the head of *Distress*, and therefore I shall here only subjoin some clauses in a late law for the more easy recovery of rents.

By the 11 G. 2. c. 19. § 1. it is enacted, "That in case any tenant or lessee of lands or tenements, upon the demise whereof of any rent is payable, shall fraudulently or clandestinely carry off his goods to prevent the landlord from distraining, it shall be lawful for every landlord, or any person by him empowered, within thirty days next ensuing such carrying off, to seize such goods wherever the same shall be found, as a distress for the rent, and the same to sell or dispose of as if the said goods had been distrained upon such premises, provided that no landlord shall seize goods sold *bonâ fide* and for a valuable consideration to any person not privy to such fraud."

And by § 3. "If any such tenant shall fraudulently remove his goods, or if any person shall knowingly assist such tenant in fraudulently conveying away his goods, or in concealing the same, all persons so offending shall forfeit to the landlord, from whose estate such goods were carried off, double the value of the goods, to be recovered by action of debt," &c.

[§ 4. Provided, if such goods and chattels exceed not the value of 50 *l.*, the landlord, his bailiff, servant, or agent, may exhibit (a) a complaint in writing against such offender or offenders before two or more justices of the peace of the same county, riding or division of such county, residing near the place whence such

(a) The complaint need not be upon oath. *The King v. Biffex*, Tr. 29 &

30 G. 2.

K. B.

1 Burn's

Just. title

Distress, 8.

(b) This is

merely an

order, not a

conviction,

and if good

in substance,

great strict-

ness in point

of form is

not requisite.

The evi-

dence there-

fore need not

be set out.

*Idem.* The

court will

intend that

the justices

had jurisdic-

tion, where

the order fol-

lows the

words of the

statute. *Id.*

It is not ne-

cessary to state

in so many words,

that the rent was

in arrear when the

goods were carried

off; it is

enough if it ap-

pears from the

order. *Id.* Nor

is it necessary

to state for what

time due. *Id.*

It is

enough to say

that the goods

were taken about

such a time. *Id.*

In a charge

against a person

for

assisting the

lessee in carrying

away the goods,

it is only neces-

sary to state that

offence; for the

carrying

away by the

lessee, and the

aiding him in

carrying them

away, are by

the statute two

distinct offences.

*Id.*

The stating the

charge in the

disjunctive, as

that the defend-

ant assisted in

removing or

concealing the

goods, is suffi-

goods and chattels were removed, or near the place where the same were found, not being in the lands or tenements whence such goods were removed, who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law, and in a summary way determine whether such person or persons be guilty of the offence with which he, she, or they are charged; and in like manner to inquire of the value of the goods and chattels by him, her, or them respectively so fraudulently carried off or concealed as aforesaid; and upon full proof of the offence (b), by order under their hands and seals, the said justices may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord, his bailiff, servant, or agent, at such time as the said justices shall appoint: And in case the offender or offenders, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders, and for want of such distress may commit the offender or offenders to the house of correction, there to be kept to hard labour without bail or mainprize for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied.

It is not necessary to state in so many words, that the rent was in arrear when the goods were carried off; it is enough if it appears from the order. *Id.* Nor is it necessary to state for what time due. *Id.* It is enough to say that the goods were taken about such a time. *Id.* In a charge against a person for assisting the lessee in carrying away the goods, it is only necessary to state that offence; for the carrying away by the lessee, and the aiding him in carrying them away, are by the statute two distinct offences. *Id.* The stating the charge in the disjunctive, as that the defendant assisted in removing or concealing the goods, is sufficient. *R. v. Middleton, 1 Burr. 399.*

§ 5. 6. Appeal given to the quarter-sessions; and appellant entering into a recognizance with two sureties in double the sum ordered by the two justices to be paid, the execution of such order in the mean time to be suspended.

By § 7. Landlords are empowered to break open houses, &c. to seize goods fraudulently secured therein, first calling to their assistance the constable, &c. of the hundred, borough, parish, district, or place where the same are suspected to be concealed; and in the case of a dwelling-house (a), oath being also first made before some justice of the peace of a reasonable ground of suspicion that such goods are therein.]

(a) Before this statute it was holden, that, when in the house, the landlord might break open an inner door. *Comb. 17.*

And by § 8. "It shall be lawful for every landlord to seize, for  
" a distress, corn and grass, hops, roots, fruits, or other product  
" growing on the estates demised as a distress for rent; and the  
" same to cut, gather, and lay up when ripe in the barns or other  
" place on the premises; and in case there shall be no proper  
" place, then in any other barn or proper place which such land-  
" lord shall procure as near as may be to the premises, and in  
" convenient time to appraise, sell, or dispose of the same to-  
" wards satisfaction of the rent, in the same manner as other  
" goods may be seized and disposed of; the appraisement to be  
" taken when gathered and made."

[By

[By § 9. The distress of corn, &c. is to cease, if the rent in arrear, and the costs of making the distress, be paid before it is cut.]

## 2. Of the Remedy by Writ of Annuity.

If a man grants by his deed an annual rent to J. S. in fee, for life or for years, and the rent is behind, the grantee may bring his writ of annuity against the grantor, and thereby charge his person; and this remedy is founded on the words of the contract, which being presumed to be founded on a valuable consideration, are always taken most strongly against the grantor; and therefore, where a man grants an annual rent, the person granting is as well liable to the charge as the land, because the person of the grantor ought to be liable to the payment of what he himself hath given.

Lit. sect.

219.

F.N.B. 152.

6 Co. 53.

Hence it follows, that no writ of annuity lies for a rent-service, because the rent-service being something reserved by the lessor by way of retribution for the land demised, proceeds not from the grant of the lessee, the reservation being the act of the lessor, and, consequently, the person of the lessee ought not to be liable to the discharge of a thing it never granted; for the lessee is only passive, and takes the lands upon such terms as the lessor is willing to part with it, and by such acceptance of the land agrees to the reservation of the rent.

Roll. Abr.

226.

It follows also, that if a man devises rent out of his land, and dies, that no writ of annuity lies for such rent, because the devise cannot take effect till after the death of the devisor, and then it is impossible to charge the person.

6 Co. 53. b.

So, no writ of annuity lies for a rent granted for equality of partition, or in lieu of dower; for though these be given by the person, yet, being granted in satisfaction of a real estate, they retain the nature of the things for which they are given, and therefore not recoverable in a personal action.

But, for the further explanation hereof, *vide tit. Annuity and Rent-charge.*

## 3. Of the Remedy by Assise.

The writ of assise lies to restore the party to the actual seisin of that freehold which he hath been divested of, and, consequently, the party who brings it must have at least an estate for life in the rent, and must have been in the seisin and enjoyment thereof.

Vide title

Assise.

## 4. Of the Clause of Re-entry.

The condition of re-entry for non-payment of rent was the remedy by the ancient law, which was afterwards changed into a distress; but is yet a remedy allowable at law, where the party provides it by the deed; as, if a man makes a feoffment, gift, or lease, reserving rent, with a condition that if the rent be behind, that it shall be lawful for the feoffor, &c. and his heirs, into the

Lit. sect.

325.

Co. Lit. 201.

202.

Glib. on

Rents, 135.

lands to re-enter; in these cases, if the rent be not paid according to the deed, the feoffor or lessor may enter into the lands, and hold them in his former estate, because the feoffment or lease was not absolute, but defeasible by the non-performance of the condition.

Lit. sect.  
327.

But, where a feoffment is made of lands, reserving rent, upon condition that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter and hold the lands, and take the profits *till he be satisfied and paid* the rent behind: this is not a condition absolutely to defeat the estate; but the feoffor in this case shall upon his entry only hold the land as a pledge, or in nature of a distress, till the rent be paid him, and the profits shall not go into the account of the rent, but shall be applied to his own use, that by such perception the tenant may be obliged the sooner to pay the arrears of rent.

Co. Lit. 203.

[The distinction when the profits taken by the lessor after

entry are, and when they are not to be in satisfaction of the rent, is not admitted in equity; for the courts of equity will always make the lessor account to the lessee for the profits of the estate during the time of his being in possession of it, and decree him after he is satisfied the rent in arrear, and the costs, charges, and expences attending his entry and detention of the lands, to give up the possession to the lessee, and deliver and pay him the surplus of the profits of the estate, and the money arising thereby. Co. Lit. 203. a. n. 3.]

Cro. Jac.  
511.  
4 Leon. 8.

And though part of the rent be paid him before re-entry, yet, if the whole be not satisfied, he may re-enter for any part that is in arrear, because the condition is to enforce the payment of the whole rent, and therefore he may take advantage for non-payment of any part thereof.

Cro. Jac.  
510. 512.  
2 Roll. Rep.  
12. 427.  
Poph. 126.  
147.  
3 Bull. 250.  
Sid. 262.  
Lev. 171.

If a man grants a rent-charge to J. S., his heirs and assigns, and if it shall happen that the rent shall be behind and unpaid, that then the said J. S., his heirs and assigns, shall enter into the land, and have and enjoy the rent thereof, *until the arrears be fully satisfied*, and the grantor covenants to levy a fine to the uses of the said deed; if, after the fine levied, the rent be arrear, the grantee may enter into the land, or make a lease for years to try his title in ejectment, because by the fine there is an estate vested in the donees to raise a use in the grantee of the rent-charge when the rent is behind; and whenever the rent becomes arrear, *the possession is executed to that use*, and, consequently, the grantee has a right to take and keep that possession till the use for which it was executed be satisfied, and that was till the arrears of rent be paid by the perception of the profits; and therefore though the grantee's interest in the land be uncertain, (because it is uncertain when the rents will be paid out of the profits,) yet, while his interest remains, if his possession be disturbed or divested, he may restore it by ejectment, which is the proper remedy to recover the possession. And if the grantee assigns over the rent, the assignee may likewise enter and maintain a title in ejectment; for though the

the use arises out of the estate of the conusee only as the rent is in arrear, and till the rent be behind and unpaid, there is nothing more than a bare possibility of a use, which in its nature is not assignable, yet, by the conveyance of the rent, it shall pass, because it is nothing more than a remedy or security for the rent, and therefore shall attend that, into whose hands soever it comes.

And by the better opinion it seems, that if the rent be arrear before the fine levied, yet the fine levied afterwards shall be sufficient to raise a use in the grantee to enter into the land for the recovery of those arrears, because the fine is guided by the deed of grant, and both amount but to one assurance, and, consequently, the fine shall have relation to that deed which leads the use of it, and makes it operate.

So it is, if such a rent had been granted to a man and his heirs, and if the rent be behind and unpaid, then it shall be lawful for the grantee and his heirs to enter, &c. the grantee, when the rent is arrear, may by such proviso enter and hold the land till he be paid the rent by the perception of the profits; for though it was objected that there was no estate conveyed, out of which a use might arise to the grantee upon the non-payment of rent, and that this grant could pass no estate to the grantee as a conveyance at common law, because the grantee could have no inheritance or freehold in the land when the rent was in arrear for want of livery, nor an estate for years for want of a certain commencement and determination; yet it was adjudged, that by the grant he had an interest vested in him when the rent was arrear; and though it be an uncertain interest, which for the uncertainty of its commencement and determination might be void by the strict rules of law, if it were granted independent on any estate certain, yet it is good in this case, because it is created to attend a determinate estate, and the non-payment of the rent fixes the certainty of its beginning, and the satisfaction of the arrears by the perception of the profits, the end and determination of such interest, and therefore the grantee may reduce such interest as it arises into his possession by ejectment, which is the proper remedy to recover the possession.

Cro. Car.  
512.

Sid. 223.  
262. 344.  
Lev. 170.  
Keb. 784.  
Raym. 135.  
158.  
Saund. 112.  
Jemett v.  
Cowley.

# 5. Of the *Nomine Pœnæ*.

This is not so much a remedy for the recovery of rent, as a penalty to oblige the tenant to a punctual payment, and this as well of a rent-charge as a rent-service; and herein these things seem observable.

Gilb. on  
Rents, 140.  
Lil. 4.  
Palm. 206.  
2 Lutw. 1151.

That in case of a rent-service or rent-charge, if it be granted that if the rent be arrear, that the tenant shall forfeit 8 s. a day as a *nomine pœnæ*, there must be an actual demand of the rent at the day to give a title to the penalty, because, till an actual demand made, it cannot appear that there was any default or neglect in the tenant, and it were unreasonable to oblige the tenant to pay such penalty without a wilful default; for the presumption is, that he was ready to pay the rent to save the penalty; and there

Hob. 82.  
208.  
Brownl. 176.  
2 Jon. 33.

is no way to overthrow that presumption but by proving an actual demand made, and then if such demand be not answered by payment, it is evident, that the tenant has wilfully neglected it, and consequently has submitted himself to the penalty.

Hob. 208.  
Hutt. 42.  
114  
Hel 87.  
[To entitle himself to the penalty, Hobart thought that there must be a demand of the rent on the day after it became due, that is, in the case here put, on the eleventh day.]

But, if rent be demanded at the day, and not paid, and, consequently, the penalty forfeited; as, if a rent be granted to *A.* for life, and, if it shall be arrear by the space of ten days after the feasts of payment, being lawfully demanded, that then the grantor shall forfeit 10*s.* by way of pain, and that then and so often it shall be lawful for the grantee to distrain till the rent and penalty be satisfied; by the opinion of *Hob.* if the grantee demands the rent at the end of the ten days, by which he becomes entitled to the penalty, the grantee on the eleventh day must likewise demand the penalty, because it is not due till after the ten days incurred, and the grantor has the whole day on which the penalty becomes due, to pay it. But *quære* whether the grantee be obliged to demand the penalty after it becomes due.

Hob. 82.  
113.  
[But per Holt, C. J. if a lessor avows for rent and a *nomine*

But, if the plaintiff brings an action of debt, or avows for the rent and *nomine pœne*, without laying an actual demand for the rent, though he cannot recover the penalty for want of such demand, yet he shall, by such suit, have judgment for the rent, because that is really due, and ought to be paid without any demand.

*pœne*, and the rent was not demanded, so that the *nomine pœne* was not due, a general judgment for both shall be entirely reversed. *Ld. Raym.* 256.]

Cro. Eliz.  
383.  
Thynn v. Cholmly.  
Moor, pl. 486.

If the tenant, that is chargeable with the rent, assigns over his interest in the land, it seems, that the assignee is chargeable with the penalty for any arrear incurred in his own time, because the *nomine pœne* being intended as an obligation on the tenant to pay the rent, that obligation, from the nature of the contract, must have continuance so long as the rent is payable; and therefore whoever takes the land, takes it under the charge of the rent, and, consequently, must be subject to that security which was originally taken upon the creation of the rent.

Cro. Eliz.  
895.  
Bendlofs v. Phillips.

If the rent be devised without mention of the *nomine pœne*, yet it shall pass as incident to the rent, because whoever has a right to the rent, ought to have all that security for the payment of it, which was taken upon the original creation of it.

Co. Lit. 162.

The *nomine pœne*, as an incident to the rent, shall descend to the heir, because, being a security or penalty to engage the payment of the rent, whoever has a right to the rent ought, in reason, to have the penalty, which is to oblige the tenant to pay it. But the statute of 32 *H.* 8. *c.* 37. gives no remedy for the recovery of the *nomine pœne*, as it does for rents, because the grantee of a rent-charge might have an action of debt for the arrears of the *nomine pœne* at common-law; for, being only a penalty, they looked on it to be only a chattel, since it did not grow due with every gale of the rent, but arose casually upon the non-payment of the rent at the day; and for the same reason the executors of the



the grantee might have an action of debt, and, consequently, there was no necessity for the statute to provide a remedy.

6. Of the Remedy by Action of Debt, &c. and as grounded on several Acts of Parliament.

The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents; the reason whereof is this: actions of debt were given for rent reserved upon leases for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were or wheresoever he should remove them: but, when the rents were reserved on the durable estate of the feud, the feud itself, and the chattels thereupon, were pledged for the rent; and, if the land were unstocked for two years, the lord had his *cessavit per biennium* to recover the land itself; and hence it is, that if the durable estate of the feud determined, as, if the lessee for life died, the lessor might have an action of debt for the arrears; because the land was no longer a security for the rent; and therefore the chattels of the tenant were liable to satisfy the arrears in an action of debt wherever the tenant removed them. Gillb. on Rents, 93.  
Co. Lit. 162.

So it was in case of a rent-charge; for if a man were seised of it in fee, and it was arrear, he could have no action of debt for the arrears; and if he died, his heir could not have any real action for the arrears, for that is proper for the recovery of the possession, which was still in him, nor could he have a personal action, because, besides the former reason, it were absurd to give a real action for the rent running on in his own time, and a personal action for the arrears in the lifetime of the ancestor at the same time; for it could not be supposed to be both a real and personal thing: for this reason also the executor could have no action for the arrears (who is entitled to the personal estate); and also because he could not entitle himself by virtue of the contract that created the rent, since the heir was constituted representative by the contract, and by consequence that representation excluded all other persons from taking any benefit as representatives, that did not come under that character. Co. Lit. 162.  
4 Co. 49.

But these inconveniencies and mischiefs are remedied by a late act of parliament, by which it is provided, "That whereas no action of debt lies against a tenant for life or lives, for any arrears of rent, *during the continuance of such estate for life or lives*, it shall and may be lawful for any person or persons, having any rent in arrear, or due upon any lease or demise for life or lives, to bring an action or actions of debt for such arrears of rent, in the same manner as they might have done in case such rent were due and reserved upon a lease for years." 8 Ann. c. 14. s. 4.

And by the statute of 32 H. 8. c. 37. the executors of a man seised either of a rent-charge, rent-service, or rent-sock, either in fee-simple or fee-tail, have now a double remedy given them for such Co. Lit. 162.  
Cro. Car.  
471.  
Lit. Rep. 93.

4 Co. 48.  
50.  
Vaugh. 40.

such arrears, either by action of debt or distress: the action of debt lies not only against the tenant that ought to have paid the rent, but against his executors and administrators; the distress runs with the land as long as it continues in the tenant's possession that suffered the rent to run in arrear, or of any other person claiming by or from him.

4 Co. 50  
2 And. 178.  
4 Leo. 115.  
Andrew Og-  
nell's case.

And therefore, if a man grants a rent-charge in fee, and afterwards makes a feoffment of the land, out of which it issues, and the feoffee makes a lease at will, the executors of the grantee may distrain the tenant at will for any arrears that became due in the lifetime of the grantor, because such tenant claims from the grantor; and so every feoffee of the first feoffee *in infinitum* claims immediately from the grantor.

4 Co. 50.

So, if the tenant makes a gift in tail, and the donee dies, the issue is chargeable with the arrears of the rent; because though he claims by descent *per formam doni*, yet it is by virtue of the gift made by the tenant.

Noy, 48.  
Moor, 846.  
pl. 1143.  
2 Roll. Abr.  
422.  
2 Vern. 612.

But, if tenant in tail makes a gift in fee, and dies, and the discontinuance charges the land with a rent in fee, and then enfeoffs the issue in tail within age, so as he is remitted, the issue is chargeable with none of the arrears; because, being remitted by the feoffment to the old estate-tail, he cannot claim under the discontinuance, but from the first donor.

Co. Lit. 162.

So it is, if the tenant dies without heirs, so that the tenancy escheats to the lord, he shall not be chargeable with any arrears of a rent-charge incurred in the life of the tenant.

Co. Lit. 162.

But before these acts, if there had been tenant for life of a rent, and he died, the rent being in arrear, his executors, by the common law, might have an action of debt for the arrears; for the executor, representing the person of the testator, succeeds in all his personal rights; and, when the rent is arrear at his death, it is no more than a single personal duty, distinct and separate from the real estate, for which there can be no remedy by real action, which recovers the freehold of which the possessor was disseised; but the arrears of the rent being no freehold, but a perfect chattel or single duty, were recoverable by the executor as all other personal things; and though the freehold determined by the death of the tenant for life, yet they did not construe such duties to cease, because there were no words in the contract to found such a construction upon; for the contract gave him the entire rent during life, and the act of God did not take it away.

If tenant *pur auter vie* or tenant for years held over, yet the lessor could not distrain them for the rent that became due before the determination of the respective leases, though they continued in the possession of the land afterwards; for when the lease was determined, the lessor could not avow on them as his tenants, claiming under a lease that was ended. To remedy this, it (a) is provided that whereas tenant *pur auter vie* and lessees for years, or at will, frequently hold over the tenements to them devised, after the determination of such leases; and whereas after the determination

(a) By the  
said statute  
8 Ann. c. 14.

determination of such, or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof; "It shall  
"and may be lawful for any person or persons, having any rent  
"in arrear, or due upon any lease for life or lives, or for years, or  
"at will ended or determined, to distrain for such arrears, after  
"the determination of the said respective leases, in the same  
"manner as they might have done if such lease or leases had  
"not been ended or determined; provided that such distress be  
"made within the space of six calendar months after the deter-  
"mination of such lease, and during the continuance of such  
"landlord's title and interest, and during the possession of the  
"tenant from whom such arrears became due."

[See the cases on this branch of the statute of Ann. tit. Distress (A).]

Also, for the more effectual recovery of rents, it is provided, "That in case any tenant for life or years, or other person who  
"shall come into possession of any lands, &c. under or by collusion  
"with such tenant, shall wilfully hold over after the determination  
"of such term, and after demand made, and notice in writing given,  
"for delivering of the possession thereof, by the person to whom  
"the remainder or reversion shall belong, or his agent, thereunto  
"lawfully authorized, such person holding over shall pay double  
"the yearly value of the lands, &c. so detained, to be recovered  
"by action of debt, whereunto the defendant shall be obliged to  
"give special bail; against which penalty there shall be no relief  
"in equity."

4 G. 2. c. 28.

And by a subsequent act it is provided, "That in case any  
"tenant shall give notice of his intention to quit the premises,  
"and shall not accordingly deliver up the possession at the time in  
"such notice contained, the said tenant, his executors or administrators,  
"shall pay to the landlord double the rent which he  
"should otherwise have paid."

11 G. 2. c. 19.  
\* Tenant by parol demise from year to year, is within this statute, and

liable to pay double rent, if he does not quit after giving notice. *Timmins v. Rootliff*, 3 Burr. 1603.  
—If tenant gives parol notice that he will quit, it is sufficient, and subjects him to double rent if he does not. *Ibid.* [A receiver under the court of Chancery is an agent lawfully authorized within this act to give notice. The court of K. B. considered the notice itself to be a sufficient demand. But the court of C. P. seemed to think the demand of possession to be distinct from the notice, for they held that a demand made on the last day of the term was premature, inasmuch as the term did not in strictness of law expire till midnight, but in the same case determined that the notice ought to be given before the expiration of the term. *Wilkinson v. Collett*, 3 Burr. 1604. *Cutting v. Derby*, 2 Bl. Rep. 1075. But the law seems to be as laid down by the court of B. R. —If a landlord give his tenant notice to quit at the expiration of his lease, he is entitled to double rent, if the tenant holds over: and a second notice given to the tenant after the expiration of the first notice "to quit on a subsequent day, or to pay double rent," is no waiver of such first notice, or of the double rent which has accrued under it. *Messinger v. Armstrong*, 1 Term Rep. 43. One tenant in common may bring this action for his moiety without his companion, 2 Bl. Rep. 1077.]

And by the last-mentioned statute it is enacted, "That  
"where the demise is not by deed, the landlord shall recover a reasonable satisfaction for the tenements (a) occupied by the defendant, in an action on the case, for the use and occupation  
"of what was so held or enjoyed; and if, in evidence on the  
"trial of such action, any parol demise, or any agreement (not  
"being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not be nonsuited, but may  
"make

11 G. 2. c. 14.  
(a) That on a lease at will the plaintiff must shew an occupation; *fecit*, on a lease for

years. "make use thereof as an evidence of the *quantum* of the damages  
 Lutw. 313. "to be recovered."  
 Salk.  
 pl. 1. 209. Ld. Raym. 28. 170. Comb 255. See 3 Salk. 136. pl. 2. [*Nil habuit in*  
*tenementis* cannot be pleaded to an action for use and occupation, *Lewis v. Wallace*, Hil. 25 G. 2.  
 K. B. Bull. N. Pri. 139. 4th edit. 2 Will 203. Nor can a defendant in such an action bring evi-  
 dence to impeach the plaintiff's title. *Cooke v. Loxley*, 5 Term Rep. K. B. 4.]

3 Lev. 150. And though at common law no action lay for rent, but an ac-  
 —That an tion of debt, yet it was held, that for the use and occupation of a  
*assumpsit* will farm, &c. an *assumpsit* would lie.  
 lie on an ex-  
 press promise, and where the reservation is of a sum in gross. Hard. 366. 4 Mod. 78. Noy, 60.  
 Allen, 57. Vent. 272. [See the clause of the stat. *supra*.]

## (L) Rent when and how discharged; and herein, of the Eviction of the Tenant.

Gilb. on [A Rent-service is something given by way of retribution to the  
 Rents, 145. lessor for the land demised by him to the tenant; and, con-  
 sequently, the lessor's title to the rent is founded upon this; that  
 the land demised is enjoyed by the tenant during the term in-  
 cluded in the contract; for the tenant can make no return for a  
 thing he has not: if therefore the tenant be deprived of the thing  
 letten, the obligation to pay the rent ceases, because such obliga-  
 tion has its force only from the consideration, which was the en-  
 joyment of the thing demised. Hence then we may gather these  
 conclusions or inferences.]

2 Roll. Abr. If the lands demised be evicted from the tenant, or recovered by  
 429. a title paramount, the lessee is discharged from the payment of  
 Hob. 82. the rent from the time of such eviction; but, notwithstanding  
 Cro. Eliz. such recovery or eviction, the tenant shall pay the rent that became  
 47. due before the recovery; because the enjoyment of the land being  
 Co. Lit. 148. the consideration for which the tenant was obliged to pay the rent,  
 201. so long as the consideration continued, the obligation must be in  
 force; there being the same reason that the tenant should pay the  
 rent for part of the time contracted for, as for the whole term,  
 if he had enjoyed the land so long.

2 Roll. Abr. So, if a disseisor makes a lease for years, rendering rent, and  
 429. afterwards the disseesee enters, and (a) ousts the lessee, yet the  
 (a) Must be lessee shall be accountable for the rent incurred before the *ouster*;  
 an actual because the lessee cannot be taken for a trespasser, since he came  
 ouster. into the lands under the sanction of a legal contract; though the  
 1 Ld. Raym. disseisor, having but a defeasible title, could not perform that con-  
 370. tract; however, till it was destroyed, and while the lessee had the  
 [It must be peaceable enjoyment, the obligation to pay the rent, which was  
 so pleaded: founded on the enjoyment, must continue, and, consequently, the  
 a plea of lessee be obliged to pay the rent till the entry of the disseesee.  
 mere entry by the lessor, or destruc-  
 tion by him of part of the premises, without alleging an actual expulsion, is not sufficient; for these are simply tres-  
 passes. Hob. 326. Reynolds v. Buckle, Cowp. 242. Hunt v. Cope, 2 Jon. 148. Roper v.  
 Lloyd.]

10 Co. 128. For the same reason, if part only of the land letten be evicted  
 2. Dyer, 56. from the tenant, such eviction is a discharge of the rent in pro-  
 Roll. Abr. portion to the value of the land evicted.  
 235.

If *A.* lets several lands to *B.*, and afterwards the inhabitants of the town, where part of the lands lie, recover a right of common in part of the lands demised; this recovery, it seems, by the strict rules of the common law, shall make no apportionment of the rent; because the recovery of the common is no eviction of the land, for the soil still remains in the lessee; and therefore there can be no apportionment. But a court of equity considers that the lessee can have little benefit by the soil itself, while others are permitted to take the profits in common with the lessee, and therefore in such cases have apportioned the rent; unless it appears, that, notwithstanding such right of common recovered, the lands demised are well worth the rent reserved upon the lease.

But the former cases are to be understood with this restriction, that if the tenant be ousted by a title paramount, before the day appointed for the payment of the rent, such eviction entirely discharges the tenant from the payment of any part of the rent. For instance, if *A.* lessee for life, makes a lease to *B.* for years, rendering rent, payable at *Easter*, and *B.* by virtue of the lease enjoys the land for nine months, and then *A.* dies, by which the interest of *B.* is determined; in this case, *B.* shall pay no rent at all; for though he held the land for nine months, yet his lease being ended before the expiration of the year, (for the rent being made payable at *Easter* only, was payable but once in a year,) there could be no rent due by the contract, for it was in consideration of the enjoyment of the land that the lessee was by the contract obliged to pay the rent at the expiration of the year; and when the enjoyment is interrupted and destroyed, the lessee shall not be obliged to pay for what he had not; nor can there be any apportionment, because by the express words of the lease it was to be paid at *Easter*, and not before \*.

As the tenant is discharged from the payment of the rent when the land is evicted by a title paramount, so, by a parity of reason, he shall be discharged from it when the lord purchases the tenancy; for in such case the lord cannot have both the land and the rent, nor shall the tenant be under any obligation to pay the rent, when the land, which was the consideration, is resumed by the lord into his own hands; and this resumption or purchase of the tenancy by the lord, makes what the law books call an extinguishment of the rent.

But, if the conveyance to the lord was not absolute, but upon condition, or, if it were only of a particular estate of shorter duration than the estate which the lord had in the rent-service; in these cases, though there be an union of the tenancy, and the rent in the same hand, yet, because that union is but temporary; (for, upon the performance of the condition or determination of the particular estate, the tenant is restored to the enjoyment of the land, and, consequently, the obligation to pay the rent revives;) therefore the rent in such case is only suspended, and not extinguished.

By the 11 *Geo. 2. cap. 19.* reciting, that, whereas if any lessor or landlord, having only an estate for life in the land, &c. dies before

Ch. Ca. 31,  
32. Jew v.  
Titkwell.  
3 Ch. Rep.  
12.

10 Co. 128.  
Salk. 65.  
pl. 1.  
1 P. Wms.  
392. pl. 105.  
\* But now,  
by the stat.  
11 G. 2.  
c. 19. s. 15.  
at the death  
of tenant for  
life, a pro-  
portionable  
part of the  
rent shall be  
paid to the  
executor.  
Vide the  
stat. *infra*.

Vaugh. 199.  
Pollex. 142.

Bro. tit.  
Extinguish-  
ment (17).  
Vaugh. 39.  
199.  
Pollex. 142.

11 G. 2.  
c. 19. s. 15.

fore

fore or on the day on which any rent is reserved or made payable, such rent or any part thereof, is not recoverable by the executors, &c. of such lessor; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, &c. from the death of the tenant for life; of which advantage hath been taken by the undertenants, who thereby avoid paying any thing for the same; for remedy whereof it is enacted, That where any tenant for life shall die before or on the day on which any rent was reserved, or made payable on any demise or lease of any lands, &c. which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such undertenant or undertenants of such lands, &c. if such tenant for life die on the day on which the same was made payable, the whole; or if before the day, then a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, or other time, in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.

Holder v. Small-brooke, Vaugh. 199. 3 P. Wms. 264. (D). Saik. 189. 2 Roll. Abr. 110. Mo. 664. Cro. El. 901. Yelv. 9. Noy, 48. But see 1 Atk. 466. where Ld. Hardwicke thought that executors if named in the grant might have taken an estate *pur auter vie*, though a freehold before the state of 29 Car. 2. Co. Lit. 41. b. n. 3, 4, 5. 14th edit. (a) Ld. C. J. Vaughan thought that there could be no occupancy, either general or special, of a rent, and therefore that the heir took in this case by descent as heir of a descendible freehold. But see the notes in Co. Litt. above referred to.

[Where rent was so granted, as that upon some contingency happening, there was no one who could take by the grant, in such case the rent was said to be *determined*, for it could not properly be said to be extinguished or suspended, these terms being only applicable when there is an union in the same person, either absolute or temporary, of the rent and the land out of which it issues. A determination of it happened, when rent was granted to one *pur auter vie*, and the tenant *pur auter vie* died in the lifetime of *cestuy que vie*, here, as there could be no general occupancy of a rent, and no special occupant was marked out, it determined upon the death of the grantee. So, where a rent was granted to one, his executors, administrators, and assigns, and the grantee died in the lifetime of the tenant *pur auter vie*, it was holden that it did not go to the executor, being a freehold which he was incapable of taking, and therefore where there was no assignment, determined by the death of the grantee. But where rent was granted to one and his heirs *pur auter vie*, and the grantee died in the lifetime of *cestuy que vie*, leaving an heir, in such case the rent is not determined, but goes to the heir as a special occupant (a). This question, however, with respect to the determination of rents by occupancy is now universally prevented by two statutes, viz. the 29 Car. 2. c. 3. §. 2. which makes estates *pur auter vie* devisable, and if not devised, chargeable in the hands of the heir as assets, if he takes them as special occupant; and if he does not, directs that they shall go to the grantee's executors and administrators, and be assets in their hands; and the 14 G. 2. c. 20. §. 4. which in the case of intestacy makes the surplus of such estates distributable.]

But see the notes in Co. Litt. above referred to.

{M) Of Apportionment\*, and herein of the Suspension and Extinguishment of the Rent: And therein,

\* *Vide* the Stat. 11 G. 2. art. 367.

1. In what Cases a Rent may be apportioned by the Act of the Parties, and herein of the Difference between a Rent-Service, and a Rent-Charge.

AND first, it is necessary to distinguish between a rent-service and a rent-charge: for if a man, who hath a rent-service, purchases part of the land out of which the rent issues, the rent-service is not extinguished, but shall be apportioned according to the value of the land; so that such purchase is a discharge to the tenant for so much of the rent only, as the value of the land purchased amounts to: but, if a man has a rent-charge, and purchases part (a) of the land out of which the rent issues, the whole rent is extinguished.

Lit. f. 222.  
8 Co. 105. b.  
Gilb. on  
Rents, 151.  
[Sav. 69.  
(a) Noy, 3.  
The terre-  
tenant must  
plead this, in  
order to ex-  
onerate the  
remainder.]

But, if the grantor by deed reciting the purchase, had granted that the grantee should distrain for the same rent in the residue of the land, the whole rent-charge had been preserved; because such power of distress had amounted to a new grant.

Co. Lit.  
147-8.  
Roll. Abr.  
236.

If a man grants a rent-charge out of two acres, and afterwards the grantee recovereth one acre by title paramount the grant, the whole rent shall not be extinguished; because the law, which gives the remedy for the recovery of a man's right, will not prevent the prosecution of such right, by depriving the prosecutor of a greater profit than the thing recovered may amount to; but, in this case, there shall be no apportionment, but the grantee shall have the whole rent after he has recovered one acre. 6 Co. 1, 2. Co. Lit. 149.

Co. Lit. 148.  
b.  
Where en-  
tire services,  
as a horse,  
hawk, &c.  
shall be ex-  
tinguished or  
revive, *vide*  
8 Co. 105.

In some cases a rent-charge may be apportioned by the act of the party; as, if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent. So, if the grantee gives part of it to a stranger, and the tenant attorns, such grant shall not extinguish the residue which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does; for the whole rent is still issuable out of the whole land, according to the original intention of the grant. Besides, since the law allowed of such sort of grants, and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it for the promotion of his children, or to provide for the contingencies of his family, which were in his view. The objection, that has been made to these sort of apportionments or divisions of rent-charges, is this, that the tenant thereby would be exposed to several suits and distresses for a thing, which in its original creation was entire and recoverable upon one avowry.

Co. Lit. 148.  
*vide* Cro.  
Eliz. 742.  
which seems  
contrary.  
[Hobart ar-  
guendo ob-  
serves, that  
the tenant is  
not compell-  
able to at-  
torn, and  
Lord C. B.  
Gilbert in  
his treatise  
on this sub-  
ject, 165.  
seems of the  
same opi-  
nion. But  
see the next  
page, and]  
*quare*, whe-  
ther by the  
stat. 4 Anne,

c. 16. f. 9. such grants be not good without the attornment of the tenant. \*\* That is, so as to affect the tenant. By 11 G. 2. c. 19. f. 11. attornment by tenants, unless made in consequence of some judgment

judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord, or to any mortgagee after the mortgage is become forfeited, are void.\*\*

Cro. Eliz.  
742. Wot-  
ton v. Shirt.

And if a rent-charge may partly be assigned by the grant of the party, much more may part of it be extended for his debts, by the favour and assistance of the law; for though the tenant is thereby, without his attornment, possibly made liable to several suits and distresses, yet it is an inconvenience he may avoid by a punctual performance of his own grant.

2 Inst. 504.  
Roll. Abr.  
234.  
Cro. Eliz.  
651. 851.  
Co. Lit.  
148. a.  
8 Co. 79. b.  
Dy. 326.  
Hob. 177.  
13 Co. 57.  
58.  
Moor,  
pl. 255-260.

It is next to be considered, whether a rent-service, incident to the reversion, may be apportioned by the grant of part of the reversion. And it seems formerly to have been doubted whether upon such grant there could be any apportionment? or whether the whole rent should not be extinguished and lost? for since the reversion and rent incident thereto, were entire in their creation, they thought it hard that by the act of the lessor they should be divided, and thereby the tenant made liable to several actions and distresses for the recovery of them. But this conception was too narrow and absurd to govern men's property long; for if I make a lease of three acres, reserving 3 s. rent, as I may dispose of the whole reversion, so may I also of any part of it, since it is a thing in its nature severable, and the rent, as incident to the reversion, may be divided too; because that being given in retribution for the land, ought from the nature of it to be paid to those who are to have the land upon the expiration of the lease; and hence it is, that the rent passes incidently with the reversion without any express mention of it in the grant; but the tenant has really no prejudice from such grant, because it is in his power, and it is his duty to prevent the several suits and distresses by a punctual payment of the rent; and therefore he ought not to complain of a mischief which he has wilfully brought upon himself. Besides that formerly such grants could not take effect without the attornment and consent of the tenant. But on the other hand it would be extremely prejudicial, if upon such grants the rent should not be apportioned; because then the lessor could not out of his property make a provision for his younger children, or answer the contingencies of his family he may have in view.

Cro. Eliz.  
637. 651.  
Ardes v.  
Watkins,  
Roll. Abr.  
234.  
Moor,  
pl. 237.  
Cro. Eliz.  
771. Ewer  
v. Moyle.

And upon this reason the apportionment of rents has been carried a step farther: as, if *A.* possessed of a term for 20 years, leases it for 10 years, reserving 30 l. rent, and afterwards *A.* devises 20 l. of the rent to three of his sons equally to be divided, this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion, to which the rent was originally incident, remains entire; for there is nothing in the nature of the thing to hinder such a division or apportionment; and if the tenant omits to pay the rent, the several actions are a mischief which he brings on himself, and which he might and ought to have prevented.

7 Co. 23.  
Butt's case.  
Co. Lit.  
147. S. P.

If *A.* seized in fee of one acre, and possessed of a term for years in another, grants a rent out of both to *B.* in fee, and *B.* takes a lease or grant of the leasehold acre, the rent shall not thereby be suspended.



If lessee for life or years surrenders part, or, if he commits a forfeiture of part, by making a feoffment or doing waste, the rent shall be apportioned; because the rent is a retribution for the land, and therefore must necessarily cease, according to the proportion of the land resumed.

Co. Lit.  
148 a.  
Roll. Abr.  
235.  
Dyer, 5. a.  
13 Co. 58. Moor, pl. 255.

Where the lessor takes a lease of part of the land, or enters wrongfully into part, there are variety of opinions, whether the entire rent shall not be suspended during the continuance of such lease or tortious entry; and in the last case it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he ought to protect and defend.

Co. Lit.  
148. b.  
Bro. tit.  
Extinguishment, 48.  
Roll. Abr.  
938.  
4 Co. 52.  
9 Co. 135.  
Pollex. 142.  
141.  
Vent. 277.

But there is no colour of reason why the whole rent should be suspended, when the lord or lessor takes a lease of part of the land, because here is the concurrence of the tenant, who, by his own act and consent, parts with so much of the land as is redeemed, and thereby supercedes the former contract as to that part; but since the obligation to pay the rent was by the first contract founded upon the consideration of the tenant's enjoying the land, that obligation must still continue on the tenant so far as it is not cancelled or revoked by any subsequent contract between the parties, and, consequently, the whole rent shall not be extinguished by such redemption; but the tenant shall pay rent in proportion to the land he enjoys, because the obligation of the first contract must subsist so far as the tenant enjoys the consideration which first engaged him in such contract.

Pollex. 141  
to 145.  
Vent. 276.  
2 Lev. 143.  
Hodgskins  
and Thorn-  
borough,  
3 Keb. 500.  
505.  
Roll. Abr.  
938.  
7 E. 3. 56,  
57. and the  
following  
cases and  
books denied  
to be law.  
Co. L. 148. b.  
4 Co. 52. b.

9 Co. 131. Bro. tit. Extinguishment, 48. and *per* Hale, Ch. J. if the tenant upon such reserved a rent, no part of the rent reserved upon the first contract shall be suspended. Vent. 276.

## 2. In what Cases they may be apportioned by the Act of Law, or by the Act of God.

In this place we are to consider, whether the tenant shall pay the whole rent, though part of the thing demised be lost and of no profit to him, or though the use of the whole be for some time intercepted or taken away without his default. And here it seems extremely reasonable, that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and therefore if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant without his default wants the enjoyment of part of the thing, which was the consideration of his paying the rent; nor has the lessor reason to complain, because if the land had been in his own hands, he must have lost the benefit of so much as the sea had covered.

Roll. Abr.  
236.

Roll. Abr. 236. If a lease be made of land with a flock of sheep, and all the sheep die, *quare*, Whether the rent shall be apportioned? Dyer, 56.—Where a house was burnt down, tenant liable for the rent. *Monk v. Cooper*, 2 *Ld. Raym.* 1477. [But this was on the express covenant, 2 *Str.* 763. *S. C.* *Earl of Chesterfield v. Duke of Bolton*, *Com. Rep.* 627. *Belfour v. Weston*, 1 *Term Rep.* 310. *Doe v. Sandham*, *Id.* 705. *Q.* Whether, if an action were brought for the rent in such case, equity would not relieve? *Brown v. Quilter*, *Ambl.* 619. Where a landlord is bound to repair in certain cases, and the tenant in one of those cases from a sudden accident is obliged to make those repairs to prevent further mischief, if an action be brought against the tenant for the rent, a court of equity will not interpose, because the tenant may set off in the action the money advanced by him for the repairs, as money paid to the use of the landlord. *Waters v. Weigall*, *Anthr.* 575.]

Roll. Abr. 237. If *A.*, seised of one acre in fee, and possessed of another for years, makes a lease of both, reserving rent, and dies, the rent shall be apportioned with the reversion, and the heir and executor shall have each his proportion.

Roll. Abr. 237. *Cambell's case.* So, if a moiety of a reversion be extended by *elegit*, the rent shall be apportioned, and the lessor shall still enjoy half the rent as incident to the reversion that remains in him.

Roll. Abr. 237. So, if a husband leases for years reserving rent, and dies, the wife recovers a third part of the reversion, she shall have the same proportion of the rent; for in all these cases the law distributes the rent as it disposes of the reversion.

Lit. f. 224. Roll. Abr. 236. *S. P.* If part of the lands descend on the grantee of a rent-charge, the rent shall be apportioned according to the value of the land; for the grantee in this case is perfectly passive, and concurs not by any act of his to defeat the grant.

### 3. The Manner of such Apportionment, and how the Tenant shall take Advantage of it.

Vent. 276. Roll. Abr. 237. This is properly the business of a jury, who upon the evidence offered are to judge of the value of the land purchased by the lord or lessor, or aliened by the tenant, according to the statute *quia emptores*, &c. from whence it is easy for them to compute how much is due from the tenant for the residue of the land in his hands.

Vent. 276. This may be done upon a plea of *nil debet* pleaded by the tenant, because when issue is joined on such plea, it is the business of the jury to determine whether any thing and how much is due; and this is done with regard to the real value of the land remaining in his hands, and not with regard to the quantity of it.

Vent. 276. So, the tenant may in his pleading set forth the value of the land purchased by the lessor, and that the rent ought to be apportioned or abated in proportion to the value thereof.

Hodgeskins v. Thornborough. But the rent cannot be apportioned upon a demurrer, because the judges only determine what is the law in such case, but the value of the land never comes in question.

If there be lord and tenant by fealty, and 20 s. rent, the lord purchase two acres, and then distrain for 18 s. rent, supposing the rent to be apportioned according to the quantity of the land, the tenant rescue, and the lord bring his assise, and the tenant plead *nil tort*, the recognitors of the assise shall extend the land according to the real value; for the jury, upon view of the land, are capable of judging of the value of each acre; and therefore, if they find the two acres aliened of greater value than the rest, they may apportion the rent accordingly, and give the lord but 16 s. for the remaining eighteen acres. And though the lord demand more than his due, yet he shall recover what in justice he ought to have, because it were unreasonable to expect the lord should exactly judge of the value of the land, and, consequently, too severe to put him to the expence of a fresh suit for such mistake.

2 Inst. 503.  
Roll. Abr.  
237.

But in this case, if the lord demand less than his due, he shall not recover more than he demanded, because the court must give judgment correspondent to the right of the demandant.

2 Inst. 504.

But, if in debt or covenant the landlord declares for more rent than is due to him, he may release the overplus, and take judgment for that which is really owing.

5 Mod. 214.  
Comb. 365.  
but *vide* Ld.  
Raym. 255.

[Com. Rep. 42. 2 Salk. 580. 5 Mod. 363. where it was holden, that *before* judgment an avowant may abate his avowry for part of the rent distrained for, but not *after* judgment.]

## Replevin and Abowry.

- (A) The Nature and Description thereof.
- (B) The different Kinds of Replevins; and herein, of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.
- (C) Replevins, out of what Courts and by what Authority they issue; and herein, of the Power and Duty of the Sheriff.
- (D) Of the Pledges in Replevin, and the Proceedings against them.
- (E) Of the Writs or Processes in Replevin: And herein,

- 1. Of the original Writ of Replevin.
- 2. Of the Withernam.

3. Of the Writ of Second Deliverance.
4. Of the Writ *de proprietate probandâ*, and the Claim of Property.
5. Of the Writ *de returno habendo*.
6. Of Returns irreplevifable.
7. In what Manner the Sheriff is to return and execute fuch Proceffes.

(F) Of what Property and for what Things a Replevin lies.

(G) Replevin, for and againſt whom it lies.

(H) Of the Declaration in Replevin.

(I) Pleas in Replevin.

(K) Avowries in Replevin; and herein, of what Seifin and Services, and the Certainty required therein.

[(L) Of the Judgment in Replevin.]

Coſts and Damages in Replevin. *Vide* Tit. Coſts, Letter (F).

### (A) The Nature and Deſcription thereof.

Co. Lit. 145. **R**EPLEVIN is a redelivery to the owner, by the ſheriff, of his  
b. 2 Inſt. cattle or goods diſtrained upon any cauſe, upon ſurety that  
139. he will purſue the action againſt him that diſtrained. If he pur-  
[Spelman ſue it not, or, if it be adjudged againſt him, then he who took the  
in his Gloſſary, *voc.* diſtreſs ſhall have it again, and for that purpoſe may have a writ  
"Replegio," of *returno habendo*.  
deſcribes it

thus—*Replegiare eſt rem apud alium detentam, cautione legitimâ interpoſitâ, redimere. Et cautio hæc eſt ſtipulatio in formâ juris adhibita, de ſtando juri, et ſiſtendo ſe foro. Diſtinctum autem replegiare quaſi revadiare, hæc eſt, vadem vel pignus unum loco alterius ſuggerere, conſtituere.* In other words, a replevin is a judicial writ to the ſheriff, complaining of an unjuſt taking and detention of goods and chattels, commanding the ſheriff to deliver back the ſame to the owner, upon ſecurity given to make out the injuſtice of ſuch taking, or to return the goods and chattels. *Gilb. Replev. 85.*]

Co. Lit. 145. Replevin is a writ, and uſually granted in caſes of diſtreſs, and is a matter of right; ſo that if a man grants a rent with claufe of diſtreſs, and grants further, that the diſtreſſes taken ſhall be irreplevifable; yet may they be replevied; for ſuch a reſtraint is againſt the nature of a diſtreſs, and no private perſon can alter the common courſe of the law.

2 Bendl. 84. In this writ or action both the plaintiff and defendant are  
Cro. Eliz. called actors; the one, *i. e.* the plaintiff, ſuing for damages, and  
709. the avowant or defendant to have a return of the goods or  
2 Mod. 149. cattle.

Carth. 122. That the avowant is in nature of a plaintiff, appears, 1ſt, From  
6 Mod. 103. his being called an actor, which is a term in the civil law, and  
Yelv. 148. ſignifies

signifies plaintiff. 2dly, From his being entitled to have judgment *de returno habendo*, and damages as plaintiff. 3dly, From this, that the plaintiff may plead in abatement of the avowry, and, consequently, such avowry must be in nature of an action. judgment as in case of a nonsuit under the stat. 14 G. 2. c. 17. Jones v. Concannon, 3 Term Rep. 661.. Shortbridge v. Hiern. 5 Term Rep. 400.]

[But a defendant in replevin is not entitled to move for

The avowant, being in nature of a plaintiff, need not aver his avowry with an *hoc paratus est verificare*, more than any other plaintiff need aver his count. Plow. 263.

An avowant being an actor, shall not have a protection cast for him more than any other plaintiff. 2 Inst. 339.

But, though an avowry be in nature of an action, yet one tenant in common may avow for taking cattle damage-feasant. Cro. Eliz. 530. [But see *contr.* Lamshead v. Leate, Sir W. Jones, 253. 1 Roll. Abr. 220. S. C. and Calley v. Spearman, 2 H. Bl. 386. He cannot avow alone, but must also make cognizance as bailiff of his companion.] That an avowant shall not have a *decem tales*. 2 Bendl. 26. \* ——— \* It is Dalison not Bendl.; and there said, that avowant shall not have a *decem tales* if he assign not default in the plea, notwithstanding he be actor; but, if the avowant purchase the *venire facias*, there, he shall have a *decem tales*.—A *tales* may be granted at the prayer of the defendant by 14 Eliz. c. 9. why then shall not an avowant have it?

Replevin is an action founded on the right, and different from (a) trespasss. Carth. 74. Yelv. 143. Hob. 16. Cro. Eliz. 799. (a) Different from a writ of execution. Carth. 380. Ld. Raym. 218.—Different from detinue. Winch, 26.

In *Finch* it is held, that when in the pleadings in replevin the title of the lands is brought in question, it is then a real action; but if otherwise, that it is a personal one. But this distinction has of late been exploded, and it is now (b) held, that as no lands can be recovered in this action, it cannot, with any propriety, be considered as a real action, though the title of lands may incidentally come in question, as it may do in an action of trespasss, or even of debt, which are actions merely personal. Finch's Law, 316. & vide Comb. 476. Fitzg. 109. (b) In the case of Eaton v. Southby. M. 12 G. 2. in C. B.

## (B) The different Kinds of Replevins; and herein, of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.

REPLEVIN may be made either by original writ of replevin at common law, or by plaint by the statute of *Marl.* 52 H. 3. Co. Lit. 145. F. N. B. 69.

c. 21. By this statute, it is provided, "That if the beasts of any person be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainfaying of him that took the beasts, if they were taken out of the liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff for default of those bailiffs shall cause them to be delivered."

The mischiefs before this act were the great delay and loss the party was at by having his beasts or goods withholden from him; 2 Inst. 139. 13 Co. 31.

as also that when cattle were distrained and impounded within any liberty that had return of writs, the sheriff was obliged to make a warrant to the bailiff of the liberty to make deliverance. There was another mischief when the distress was taken without and impounded within the liberty; to remedy which,

2 Inst. 139.  
Keb. 205.  
Dalt. Sh.  
430.

By this statute the sheriff, upon a plaint made unto him without writ, may either by parol or precept command his bailiff to deliver the beasts or goods, that is, to make replevin of them. By these words (*post querimoniam sibi factam*) the sheriff may take a plaint out of the county court and make replevin presently, which he is to enter in the court, as it would be inconvenient and against the scope of the statute that the owner, for whose benefit the statute was made, should tarry for his beasts till the next county court, which is holden from month to month. And by this act the sheriff may hold plea in the county court on replevin by plaint, though the value be of 20*l.* or above; and yet in other actions he shall only hold plea where the matter is under 40*s.* value.

Com. 591.

By the words of this law, *si averia capiant, vicecomes post querimoniam sibi factam deliberare possit*; so that it becomes the sheriff's duty upon such complaint, by parol or by precept to his bailiff, to replevy them, which precept may be given before any county court; but such plaint is afterwards to be entered, and, as holden in *Com.* by the party who made the complaint, and not by the sheriff. [*Sed quare?*]

### (C) Replevins, out of what Courts and by what Authority they issue; and herein, of the Power and Duty of the Sheriff.

-Dyer, 246.

(a) Lies by writ in the Cinque

Ports. F. N. B. 67. Reg. Brev. 79.

**R**EPLEVINS by writ issue (a) properly out of the courts of K. B. and C. B. at *Westminster*, and are returnable into such courts.

Bro. Rep.

pl. 40.

Co. Lit. 145.

2 Inst. 139.

Replevins by plaint are made by the sheriff by force of the above-mentioned statute of *Marlebk.* (52 H. 3. c. 21.) by which he is directed, upon complaint made to him by the party that his goods or cattle are distrained, to command his bailiff (which may be by parol or precept) to make deliverance. This plaint may be taken at any time, as well out of, as in court.

Carth. 380.

(b) Replevin lies by plaint

in London.

2 Lil. Reg.

557.

—But,

where on a *pluries* to the sheriffs of London, they returned the custom of the city, that replevin ought to be made in the sheriff's court there, and not by the king's writ, an attachment was granted; for they cannot oust the king's courts of their jurisdiction by their customs, though confirmed by act of parliament. Dyer, 245. F. N. B. 68. — By the usage in Northamptonshire, in the absence of the sheriffs, bailiff, &c. the frankpledge may make deliverance by replevin. 2 Inst. 139. — Replevin does not lie in the Marshalsea court. 10 Co. 74. — Nor in the court of Canterbury. 3 Keb. 573. — Whether to the court of Halifax. 2 3 Keb. 550.

And

And therefore where in trespass for taking, &c. the defendant justified that the place where, &c. was a hundred, and time out of mind had a court of all actions, replevins, &c. grantable in or out of court, and that a replevin was granted to him by the steward out of court, *virtute cuius*, &c.; the question was, if good or not? And the reason of the doubt was, because the county court could not hold plea in replevin at common law; but were enabled by the statute of *Marlebridge*, which extends not to the hundred court, which is a court derived out of the county court. But *per cur.* clearly, supposing they may grant them in court, yet they cannot prescribe to grant them out of court.

2 Salk. 580.  
[The different reports of the case of *Hallet v. Birt* do not agree as to the opinion of the court upon this point.  
Carthew's report is stated in the passage immediately preceding.]

The language of the court in 11 Mod. 120. is this—Suppose the hundred court might hold plea of replevin, which is hard to imagine, yet it must be as a court; and asked how a thing can be grafted on a prescription, which had its original by act of parliament: and gave judgment for the plaintiff. *Skin.* 674. S. C. adjudged for the plaintiff; because the defendant having shewn the property in a stranger, the plea amounts to the general issue; and though a hundred court may hold plea in replevin, this ought to be in court, and not out of court. S. C. 5 Mod. 252. accordingly; and *per cur.*—It is true, all these courts do hold plea in replevins; but it is illegal; for the party ought to go to the sheriff for the purpose, whose court is in nature of a court-baron. Therefore this custom was holden to be void, as against law and reason. And so the plaintiff had judgment, the plea being naught. 1 Ld. Raym. 219. S. C. faith, that after several arguments at the bar it was resolved, that since the sheriff could not replevy by plaint at the common law, but by writ only, and that in his county court; the hundred court, which derives its authority from the county court, cannot do it by prescription. And the statute of *Marlebridge* does not extend to the hundred court; therefore this replevin granted out of this court is ill, especially being granted by the steward, who is not a judge of the court; and the usage in such case will not alter the law; therefore judgment was given for the plaintiff.]

The sheriff is obliged to grant replevins in all cases where they are allowed by law; and the officer, who takes the goods by virtue of a replevin issuing for what cause soever, is not liable to an action of trespass, unless the party in whose possession the goods were claims property in them. And note, that in all cases of misbehaviour by the sheriff or other officers, in relation to replevins, they are subject to the controul of the king's superior courts, and punishable by attachment for such misbehaviour. Carth. 381.

And though the sheriff may grant replevins by plaint, and may proceed thereon in the county court, yet, if any thing touching the freehold come in question, or ancient demesne be pleaded, the sheriff can proceed no further; nor can any such proceedings be carried on in the hundred court, court-baron, or any other court claiming a jurisdiction herein by prescription. 4 H. 6. 30.  
2 H. 7. 6.  
Co. Lit. 145.

So, when the king is party, or the taking is in right of the crown, in these cases the sheriff is to surcease. Bro. tit. Repl. pl. 33.  
Brown. 33.

[*Vide* Bro. tit. Repl. pl. 51. *contr.* And a replevin lies against the king, if goods be in his hands. *Per* Hide, to the Lords. 3 Rush. 1361. But, if a distress is taken upon a fee farm rent or other duty to the crown, it is considered as a contempt to replevy; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14. And, if a man at this day, there being a seizure in order to condemnation, were to presume to replevy the goods, it would be a contempt of the court of Exchequer, for which an attachment would be granted instantly. *Per* Eyre, C. B. Anstr. 212.]

It was ruled in the case of one *Bradshaw*, that when an act of parliament orders a distress and sale of goods, this is in nature of an execution (a), and replevin does not lie: but, if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him. And *Porwell*, Justice, said, he remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due

T. 12 W. 3.  
in C. B.  
*Bradshaw's* case.  
*Vide*  
14 Car. 2.  
c. 12.  
(a) A reple-

vin does not lie for goods seized by due to the king, yet upon debate in the court no attachment was granted (a), though it was in the king's case.

warrant of a justice of peace, upon a conviction for destruction of the game, &c. *Semb.* 2 Mod. Ca. 208, 9. — [(a) But now in such cases it is considered as a contempt for a party to replevy; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14. Anstr. 212. S. C. cited by Eyre, C. B. — Replevin does not lie for goods distrained on a conviction (for deer-stealing). *Rex v. Monkhouse*, 2 Stra. 1184. — And if the under-sheriff grants it, an attachment shall go against him. *Ibid.*]

Gilb. Re-  
plev. 154.

[If a superior jurisdiction award an execution, it seems, that no replevin lies for the goods taken by the sheriff by virtue of the execution; and if any person should pretend to take out a replevin, and execute it, the court would commit him for a contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them: and it would be troubling the execution awarded if the party on whom the money was to be levied should fetch back the goods on a replevin. And therefore the courts construe such endeavours to be a contempt of their jurisdiction, and upon that account commit the offender. But, if any inferior jurisdiction issues an execution, a replevin will lie for the goods taken by that execution; because the inferior jurisdiction being restrained within particular limits, the officer who took the goods, is obliged to shew that he took the goods within those limits, and that the inferior court which issued the execution, did not exceed their authority in issuing it.

Milward v.  
Caffin,  
2 Bl. Rep.  
330.

When justices exceed the special jurisdiction given to them by a particular statute, the goods which have been distrained in consequence of such excess of jurisdiction may be replevied, even though the court of appeal has confirmed the warrant of distress. As, where a distress was taken for a poor's rate for lands not on the occupation of the plaintiff, the court held, notwithstanding the sessions on appeal had confirmed the rate, that the distress was repleviable, because the determining that a man may be assessed for what he does not occupy, was an excess of the jurisdiction given by the 43 *Eliz. c. 2.* and 17 *G. 2. c. 38.*

Callis, 195.  
7. 200.

Pritchard v.  
Stephens,  
6 Term Rep.  
522.

It hath been said, that goods taken under a warrant of distress granted by commissioners of sewers, cannot be replevied by the sheriff, at least, whilst in the hands of the officer. But this opinion hath been doubted of by very high authority. And where goods so taken had been actually replevied, and the proceedings in replevin had been removed into the King's Bench, that court refused to quash the proceedings in a summary way, but left it to the defendant in replevin to put his objection on the record.]

1 & 2 P. &  
M. c. 18.

And for the greater ease in bringing replevins, and as a duty incumbent on the sheriff, it is enacted, by the 1st and 2d *Ph. & Mar. cap. 18.* "That the sheriff shall, at his first county day, or within two months after he receives the patent, depute and proclaim in the shire-town four deputies to make replevins, not dwelling above twelve miles distant from one another, on pain to forfeit for every month he wants such deputy or deputies 5 *l.* to be divided between the king and the prosecutor."



(D) Of the Pledges in Replevin, and the Proceedings against them.

WHEN the sheriff makes replevin, he ought to take two kinds of pledges, *plegii de prosequendo*, by the common law, and *plegii de returno habendo*, by the statute of *West. 2. (13 Ed. 1. stat. 1.) cap. 2.* by which it is provided, “That sheriffs or bailiffs from thenceforth shall not only receive of the plaintiff pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the bailiff be not able to restore, his superior shall restore.”

1 Inst. 340.  
Dalt. Sh.  
433.  
Hutt. 77.

In the construction hereof, the following cases have been ruled, and opinions holden.

That if the sheriff returns insufficient pledges, he shall answer according to the statute; for insufficient pledges are no pledges in law; and such pledges must not only be sufficient in estate, *viz.* capable to answer in value, but likewise sufficient in law, and under no incapacity; and therefore infants, feme coverts, persons outlawed, &c. are not to be taken as pledges, nor are persons politick, or bodies corporate.

Co. Lit. 145.  
2 Inst. 340.  
10 Co. 102.

In replevin the sheriff did not return any pledges, and after issue joined and found, it was moved, if they could be put in by the court after verdict; and the court held they might, notwithstanding the said statute of *Westm. 2. (13 Ed. 1. st. 1.)* as before that statute the court might take pledges on the omission of the sheriff. And a diversity was taken between pledges for prosecuting, which were at common law, and *pro returno habendo* given by this statute; and the court held, that though upon the default of the sheriff he was subject to the actions of the party, that yet the taking of pledges by the court did not make the judgment erroneous.

Noy, 156.  
T. 4 Car. 1.

A replevin by plaint was sued in the sheriff's court in London, and pledges were found *de returno habendo* &c. this plaint was removed according to their custom into the Mayor's court, and after into the King's Bench by *certiorari*, and there oyer of the *certiorari* being demanded, the party declared in *B. R.* Upon this a return was awarded, and upon an *elongat* returned a *scire facias* went against the pledges in the sheriff's court of London. Upon a demurrer, the question was, whether this case being removed by a *certiorari*, the pledges in the inferior court are discharged, or whether they remain liable to be charged by this *scire facias*? The court was inclined to be of opinion, that the pledges are not discharged, for the mischief that might ensue; for then the plaintiff might bring a *certiorari*, and the defendant would lose his pledges; and on the other side, they doubted whether the

Skin. 244.  
pl. 9.  
2 Show. 421.  
pl. 383.  
Comb. 1, 2.  
3 Mod. 56.  
S. C.

principal,

*principal* be in court but at his pleasure, and that he is not demandable, and cannot be nonsuited. But afterwards at another day it was adjudged, that the pledges were not discharged.

Cro. Car.  
446.  
Jon. 378.  
S.C. Moyser  
v. Gray,  
Mayor of  
Beverly.  
\* On a *scire*  
*facias* against  
a sheriff for  
not taking  
pledges, he  
must plead  
*ad idem*.  
Hayn v.  
Bigg.  
Fort. 331.

In case the plaintiff declared that he distrained for 7*l.* 10*s.* rent, reserved on a lease, and that the defendant delivered the cattle without taking pledges; to which the defendant pleaded, that the plaintiff in the replevin delivered to him 3*l.* 10*s.* for pledges, which he accepted; and on demurrer the court held, that pledges being to be found to answer the party, if he had good cause of avowry, and to be answerable for the amercement to the king, if he be nonsuited, or if it be found against him; the taking of money for a pledge was not lawful; and that although he might take money for pledges, yet he ought not to accept less than the plaintiff's demands; on which account the court likewise held the plea vicious. But they agreed, that if the mayor had taken but one pledge, (if he had been sufficient,) it had been well enough \*.

Ld. Raym.  
278.  
2 Lutw.  
686.  
Blakitt v.  
Crislop.

But it hath been adjudged, that a bond taken by the sheriff, conditioned that if the party applying for the replevin should appear at the next county court, &c. and prosecute his action with effect, and should make return of the thing replevied, if return should be adjudged, and save the sheriff harmless, &c. was good in law, and agreeable to the intention of the statute of *Marleb.* (52 H. 3. c. 21.) which requires pledges or sureties, of which nature the obligors are. And this method of taking bond instead of pledges was said to be of ancient usage; and that in the old books *plegii* signified the same as sureties; and that, there being a proper remedy on such bond, it differed from the above case in *Cro. Car.* of taking a deposit or sum of money. But the court agreed, that at common law this bond had been void, because it had been to save the sheriff harmless in making replevin by plaint, which it could not have done before the statute of *Marleb.*

Carth. 248.  
Show. 400.  
S. C.  
Chapman v.  
Butcher.

If in replevin in an inferior court, the condition of the bond is, *if he prosecute his suit commenced with effect in the court of ———, and do make return, &c. if a return be adjudged by law*, and it happens, that the plaintiff hath judgment in the court below, which is afterwards reversed on a writ of error in *B. R.* in such case, unless the party makes a return, he forfeits his bond; for though he had judgment in the court below, yet the words, *if he prosecute his suit commenced, &c.* extend to the prosecution of the writ of error, which is part of the suit commenced in the court below. And in this case, the taking of such bond was held to be (a) lawful, and said to be the common practice.

(a) Fitzg.  
158.  
Portesc.  
Rep. 209,  
270.  
Comb. 222.  
Lane v.  
Foulk.

In debt upon a replevin-bond taken by the sheriff, conditioned that if *C. B.* appear at the next county court, and prosecute with effect for taking, &c. and make return, &c. if return be adjudged, and save harmless the sheriff, &c. then, &c. the defendant after oyer pleaded, that at the next county court, *tent. tali die*, he did appear, and prosecuted, &c. until it was removed by *recordari*, and

and did save harmless the sheriff, but did not say, that no *return' habend'* was adjudged. Upon demurrer, the court inclined for the plaintiff: for the defendant should have said, that no return was adjudged at all; and though he prosecuted to the *recordari*, yet *return' habend'* might be adjudged afterwards; and the condition goes to any adjudication of return\*.

† In debt on a replevin bond, it is a bad plea, that defendant appeared at the county court; he

must follow it wherever removed to the end of the cause. Anon. Fort. 209. Nichols v. Newman. Fort. 361.—In debt on a replevin-bond, that he had performed all conditions is a bad plea; he should plead he did indemnify. Lutwydge v. Jameson. Fort. 210.—If debt is brought on a replevin-bond for not prosecuting in the county court with effect, and plaintiff replies, he (present defendant) removed it by *recordari* into C. B. and was there nonsuited, the replication is well. Vaughan v. Norris, Ca. temp. Hardw. 137.

An action was brought upon a bond in replevin to prosecute his suit with effect, and also to make return, &c. the defendant pleaded, that *E. G.* did levy a plaint in replevin in the court before the steward of *Westminster*, and that afterwards, and before the suit was determined, viz. on such a day, &c. *E. G.* died, *per quod* the suit abated; the plaintiff replied, *quod bene et verum est*, that *E. G.* levied such a plaint against the defendant, who immediately afterwards exhibited an *English* bill in the Exchequer against the plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c. on which the said *E. G.* died; so that he did not prosecute his suit with effect. Upon a demurrer to this replication the defendant had judgment; for, *per Holt*, Ch. J. this was a prosecution with effect, because there was neither a nonsuit nor verdict against *E. G.*

Carth. 519. Duke of Ormond v. Brierly.

In an action upon a replevin-bond, common bail shall be filed.

Salk. 99-pl. 8.

There are two sorts of pledges, *plegii de prosequendo* and *plegii de retorno habendo*; the pledges of prosecuting were at common law, but those *de retorno habendo* were appointed by *West. 2.* (13 Ed. 1. stat 1.) cap. 2. by which statute an action lies against the sheriff, if he omits to take pledges, or, if he takes those that are insufficient; for, the party may have a *scire facias* against the pledges, where the suit is in any court of record. And though, in the county court, &c. a *scire facias* will not lie against the pledges, because these are not courts of record, and every *scire facias* ought to be grounded on a record, yet, there, the party may have a precept in nature of a *scire facias* against the pledges.

Ld. Raym. 278. Per Holt, Ch. J. & vide Comb. 1, 2. Com. 593. [And not only the sheriff, but the under-sheriff, and the replevin clerk are responsible for the sufficiency of the sureties. Richards v. Aston, 2 Bl. Rep. 1100.]

An action on the case was brought against a sheriff for taking insufficient pledges upon a replevin; to which he pleaded not guilty, and a verdict being found against him, and judgment given thereon in the court of C. B. on a writ of error in B. R. it was objected, first, that an action on the case was not the proper remedy; 2dly, supposing such action lay, that there ought to have been a *scire facias* first sued out against the pledges. As to the first the court held, that the party distraining has by the statute of *West. 2.* (13 Ed. 1. stat. 1.) an interest in the pledges, and if the sheriff omits to take such, or, which is the same thing, takes insufficient ones, he is aggrieved, and, consequently, entitled to his action (a). 2dly, That though a *scire facias* may be brought against

16 Vin. Abr. 399. Pl. 4. M. 12 G. 2. Rouse v. Paterson, in B. R. [Bull. N. P. 60. 4th edit. S. C. by the name of Prowse v. Pattison. (a) In such action some evidence must be

given of the insufficiency of the pledges or sureties, but very slight evidence is against the pledges, yet it does not follow from thence, that an action does not lie against the sheriff; and such *scire facias*, which is only to certify the sufficiency of the pledges, is the less necessary in the present case, such insufficiency being set forth in the declaration, and found by the verdict.

sufficient to throw the proof upon the sheriff; for the sureties are known to him, and he is to take care that they are sufficient. *Saunders v. Darling* and another. Bull. N. P. 60. 4th edit.—The extent of the sheriff's liability in this action, where the replevin has been of a distress for rent, does not seem to be yet precisely settled. In *Gibson v. Burnell*, C. B. 30 G. 3. (cited in 2 H. Bl. 549. and 4 Term Rep. 434.) Gould, J. before whom the action was tried, held, that the plaintiff might recover the costs of the replevin suit, as well as the rent in arrear. In *Yea v. Lethbridge*, 4 Term Rep. 433. the court of K. B. held, that the sheriff was not answerable beyond the value of the distress. In *Concanen v. Lethbridge*, 2 H. Bl. 36. the court of C. B. determined, that he was liable for the whole damage which the party had sustained by his neglect. But afterwards, in *Evans v. Brander*, 2 H. Bl. 547. the court of C. B. (three of the judges being then changed) said the sheriff should be liable no further than the sureties would have been if he had done his duty, and taken a bond under the statute 11 G. 2. c. 19. and they had been sufficient; that their responsibility was limited by that statute to double the value of the goods distrained, which sum ought to be the measure of damage against the sheriff.—The party being entitled to an action against the sheriff for omitting to take a replevin-bond, the court of K. B. will not therefore grant an attachment against him. *Rex v. Lewis*, 2 Term Rep. 617.—A defendant in replevin is entitled to an assignment of the bond, if the plaintiff in replevin do not appear in the county court, and prosecute according to the condition. And he may sue the bond as assignee of the sheriff in the superior courts, though the replevin be not removed out of the county court. *Dias v. Freeman*, 5 Term Rep. 195.]

And for the greater security of persons distraining for rent, it is enacted,

11 G. 2.

c. 19. § 23.

“ That sheriffs and other officers having authority to grant replevins, shall in every replevin of a distress for rent take in their own names, from the plaintiff and two sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer,) and conditioned for prosecuting the suit with effect and without delay, and for returning the goods, in case a return shall be awarded, before any deliverance be made of the distress; and such sheriff or officer taking such bond, shall, at the request and costs of the avowant or person making confession, assign such bond to the avowant, &c. by indorsing the same, and attesting it under his hand and seal in the presence of two witnesses, which may be done without any stamp, provided the assignment be stamped before any action be brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the court may by rule give such relief to the parties upon such bond, as may be agreeable to justice; and such rule shall have the effect of a defeasance.”

## (E) Of the Writs or Processes in Replevin: And herein,

### 1. Of the original Writ of Replevin.

F. N. B.  
69, 70.  
Doct. pl.  
313, 314.

THE original writ of replevin issues out of Chancery, and neither that nor the *alias* replevin are returnable, but are only in nature of a *judicium* to empower the sheriff to hold plea in his county

county court, where a day is given the parties. But the *pluries* replevin is always with this clause *vel causam nobis significes*, and it is a returnable process.

2 Inst. 139.  
Salk. 410.  
—That it is usual to take  
Dalt. Sh. 273.

out the writ *alias* and *pluries* at the same time.

[When the *pluries* issues, it hath been much disputed, whether the sheriff's *vicontiel* power be determined. And it is said in one case (a), that since the writ is to replevy, *vel causam significes*, the *vicontiel* power determines. But, if the sheriff does not replevy, then he is to shew cause why he did not; and this is argued to be the sense of the writ from the disjunctive words contained in it. But I take it, saith Gilbert, that the *vicontiel* power is determined by the *pluries*. 1. Because the sheriff has been twice guilty of neglecting his duty, and therefore is not to be trusted with judicial power. 2. He is answerable to the court how he has obeyed the writ; and therefore the court must have the writ, to see whether he has done his duty or not. And if the court be entitled to the writ, to see whether the officer has done his duty, he cannot proceed on the writ.]

Gilb. Replev. 106.  
(a) 2 H. 7.  
5. Fitz. Abr.  
tit. Replevin, pl. 16.

If a *pluries* replevin be returned in *Michaelmas* term, that the defendant claimed property, and after nothing be done, nor any appearance nor continuance till *Easter* term after, at which term they appear and plead, and judgment be thereupon given; though no continuance was, between *Michaelmas* and *Easter*, yet this is not a discontinuance, because there is not any continuance till appearance, for the parties have not any express day in court, and where there is not any continuance, there cannot be any discontinuance.

Roll. Abr. 485.  
Gaven v. Ludlow.  
Moor, 403.  
S. C. adjudged, that the plaintiff may have a writ *de proprietate probanda* with-

out continuance of the replevin, though it be two or three years after, because by the claim of property the first suit is determined.

The *pluries* replevin supercedes the proceedings of the sheriff, and the proceedings are upon that, and not upon the plaint, as they are when that is removed by *recordari*. And though there is no summons in the writ, yet it gives a good day to the defendant to appear, and if he does not appear, then a *pone* issues, and then a *capias*.

Ld. Raym. 617.

*Capias* and process of outlawry lie in replevin; for, when on the *pluries replegiari fac'* the sheriff returns *averia elongata*, then a *capias* in withernam issues, and on that being returned *nulla bona*, a *capias* issues, and so to outlawry.—*Capias* and process of outlawry in replevin were given by 25 E. 3. c. 17.

6 Mod. 84.

## 2. Of the Withernam\*.

\* Vide Bl. Com. 3 v. 148, &c.

If on the *pluries* replevin the sheriff return, that the cattle are elowned to places unknown (b), &c. so that he cannot deliver them to the plaintiff, then shall issue a (c) *withernam* directed to the sheriff, commanding him to take the cattle or goods of the defendant,

F. N. B. 73. (b) On what returns made by the sheriff a

withernam shall issue. Dalt. Sh. 276. defendant, and detain them (*d*) till the cattle or goods distrained are restored to the plaintiff; and, if upon the first *withernam* a *nil* be returned, then an *alias* and *pluries* replevin shall issue, and so [(*c*) *Withernam* is de-

rived from the Saxon words *weder* (other) and *naam* (distrs), signifying another distrs, instead of the former, which was eloigned. *Velitum namium* signifies a forbidden distrs; and therefore though a distrs were originally lawful, yet, if it be detained against the replevin, it is *velitum namium* and unlawful. Gilb. Replev. 109. 2 Inst. 140, 1. In the old Northern languages the word *withernam* is used as equivalent to reprisals. Stiernhook de Jure Sueon. l. 1. c. 10.—(*d*) It is said, that it is the usage in the King's Bench, that they shall be delivered to the plaintiff: by which, it seems, that the form of the writ of *withernam* there is different from that in the register. This is a point that has been several times controverted, and some of the clerks made the distinction between the practice of the King's Bench and Common Pleas. But the true distinction is between the *original* and the *judicial* writ of *withernam*. By the former, the sheriff is to take *et ea devinere donec eidem*, &c. which obliges the sheriff to detain the cattle or goods in his own custody. But in the *judicial withernam* the words are, *capias in withernam, et salvo et securè custodiri facias, donec*, &c. which is to be interpreted, "that he must deliver them to the plaintiff upon good security," for that is making them to be safely kept. The reason of the difference is this, that upon the *original* writ below, where it was found that the beasts were eloigned, the award of taking the defendant's beasts could be only *quousque* he gaged deliverance. For even an execution in the sheriff's court was no more than levying a pain, to make the party perform the sentence of that court; for they could not execute the sentence of that court by changing the property, or delivering it over to the suitor, but by levying pains to make the party perform it. And when the return of *elongata* is made into Chancery, the *withernam* goes out as a *vicontial* process, and is conceived in the same manner as it is below; and therefore in the writ *de executione faciendâ in withernam*, there is no return into the king's courts. But, where the *elongata* is returned into the King's Bench or Common Pleas, there, the *withernam* goes out as a *judicial* process, and there, the courts, who can alter the property, have made it *secundum legem talionis*, viz. that the defendant's goods shall be delivered to the plaintiff to make use of them, until his own are restored. And it was said to be the practice of the King's Bench, because that was the court, where the *lex talionis* in the case of murder and maihem settled the practice. Gilb. Replev. 120, 1.]

F. N. B. 69. "The writ of withernam ought to rehearse the cause which the sheriff returns, for which he cannot replevy the cattle or goods; so that it does not lie upon a bare suggestion, that the beasts are eloigned, &c.

2 Leon. 174. "If upon the withernam the cattle are restored to the party who [(*c*) The writ of] eloigned them, yet he shall pay a fine for his contempt (*e*).  
withernam therefore is *ad respondendum tam domino regi de contemptu, quam parti de damno et injuriâ*.]

Leon. 220. Cattle taken in withernam may be worked, or, if cows, may be milked; for the party hath them in lieu of his own.

Owen, 46. And as the party is to have the use of the cattle, he is not to have any allowance or payment made to him for the expences he has been at in maintaining them.

Pasch. Scire facias against an executor, reciting that where replevin was brought against his testator for a cow, and judgment against him *de returno habendo*, which was not executed, that he should shew cause why he should not have execution. The executor pleads *plene administravit*, upon which the plaintiff demurred; and Wyld, Justice, said, that upon the judgment the cow is in the custody of the law, and therefore he ought to have execution; but the doubt is, because the replevin is determined by the death of the party; yet, by him and Rainsford only, being in court, the plaintiff shall have execution, for the defendant cannot be prejudiced; for, if the sheriff return *averia elongata*, he shall not

have a withernam but of the goods of the testator ; or if there are no goods of the testator, the sheriff can take nothing, but shall return *nulla bona*, and then the plaintiff hath his ordinary way to charge the defendant, if he hath made a *devastavit* ; and it was adjudged for the plaintiff.

*W.* sues a replevin, *H.* removes it by *recordari* into the King's Bench, the plaintiff does not declare, and upon that a return awarded to *H.*, upon which the sheriff returns *averia elongata*, and then a withernam was awarded and executed ; and now the plaintiff comes and prays he may be admitted to declare, and prays a deliverance of the withernam. It was testified by the clerks, that upon the plaintiff's submission to a fine for not declaring, and that being imposed upon him by the judges, he shall have deliverance of the withernam ; and a fine of 3*s.* 4*d.* being accordingly imposed on the plaintiff, he then declared, and had deliverance.

If, upon an *elongata* returned, the defendant's cattle are taken in withernam, yet, upon the defendant's appearance, and pleading *non cepit*, or claiming property, the defendant shall have his cattle again ; and if they are eloigned, a withernam against the (a) plaintiff. For, if the property or taking be in question, there is no reason that the plaintiff should have the defendant's cattle.

Noy, 50.  
Webb v.  
Hind ; and  
said, that  
the course of  
B. R. is  
contrary to  
that of C. B.

Ld. Raym.  
614.  
(a) That  
both the  
plaintiff and  
defendant  
may have a  
withernam,

Bro. tit. Withernam, pl. 17.

The withernam is but mesne process, and cannot be an execution, because it is granted before judgment.

Ld. Raym.  
614. & vide  
Comb. 201.  
2 Salk. 582.

### 3. Of the Writ of Second Deliverance.

At the common law, if the plaintiff in the replevin had been nonsuited either before or after verdict, the defendant who distrained should have had return, but not irrepleviable ; so as the plaintiff after nonsuit might have had as many replevins as he would, which was vexatious and mischievous ; for remedy whereof the statute of *West. 2.* (13 *Ed. 1.* *st.* 1.) *cap.* 2. restrains the plaintiff from any more replevins after nonsuit, but gives a writ of second deliverance.

2 Inst. 340.

And if in such writ of second deliverance the plaintiff be nonsuited, or if the plea be discontinued, or the writ abate, or if he prevail not in his suit, return irrepleviable shall be granted.

2 Inst. 341.

If defendant in replevin has return awarded upon nonsuit of the plaintiff, upon which he sues a writ *de returno habendo*, and the sheriff returns *averia elongata per querentem*, and upon this a withernam is awarded, and upon the withernam the defendant has *tot catalla* to him delivered of the goods of the plaintiff, and thereupon the plaintiff sues a second deliverance ; he shall sue it for the first distress taken, and not for the withernam. And this appears by the nature and form of the writ of second deliverance.

2 Roll. Abr.  
435.

If a *returno habendo* be awarded to the sheriff after a writ of second deliverance prayed by the plaintiff, this is a *superfedeas* to the *returno habendo*, and closes the sheriff's hand from making any return

Dyer, 41.  
Dalt. Sh.  
275.

turn

turn thereto. And if the sheriff will not execute the writ of second deliverance, the party has his remedy against him.

Plow. 2c6.  
(a) That the writ of second deliverance cannot vary from the first in

This statute of *Westm. 2. 13 Ed. 1. stat. 1.* gives the writ of second deliverance out of the same court, where the first replevin was granted, and a man cannot have it elsewhere; for if he could, then he might (a) vary from the place limited as to this by the statute.

year, day, place, or number of beasts. Bro. tit. Second Deliverance, pl. 3. But, if the first writ was of a heifer, the second may be of a cow, as by presumption it may in that distance of time grow to such. 26 H. 8. pl. 7.

Salk. 95.  
pl. 6. and  
like point  
adjudged,  
Palm. 403.  
Latch, 72.

In replevin the defendant avowed, and the plaintiff being nonsuited brought a writ of second deliverance, whereupon it was moved to stay the writ of inquiry of damages. *Per curiam* - This is a *superfedeas* to the *retorno habendo*, but not to the writ of inquiry of damages; for these damages are not for the thing avowed for, but are given by the statute of 21 H. 8. cap. 19. as a compensation for the expence and trouble the avowant has been at.

Cooper v.  
Sherbrooke,  
2 Will. 116.

[So, it has been determined, that the writ of second deliverance is no *superfedeas* of the writ of inquiry of damages upon the 17 Car. 2. c. 7.]

Cro. Jac.  
424.  
Newman  
v. Moor.

Error of a judgment in *C. B.* in a second deliverance; upon demurrer in pleading, the error assigned was, because there was not any writ of second deliverance certified, and *in nullo est erratum* being pleaded, it was moved not to be material, because it is awarded on the roll, and the parties had appeared and pleaded to it: but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if it vary from the declaration in the replevin, it shall be abated.

2 Lill. Reg.  
457.

No second deliverance lies after a judgment upon a demurrer, or after a verdict, or confession of the avowry; but in all these cases the judgment must be entered with a return irreplevifable. But upon a nonsuit, either before or after evidence, a writ of second deliverance will lie, because there is no determination of the matter, and there, a writ of second deliverance lies to bring the matter in question; but in the case of a demurrer and verdict, the matter is determined by law; and in the case of a confession, it is determined by the confession of the party.

Gillb. Re-  
plev. 219.  
1 Ld. Raym.  
217.

[Where a defendant puts in a plea to the writ of replevin, as, property in a stranger, or in the defendant; and these pleas disaffirming the property of the plaintiff, are by verdict found for the plaintiff, or upon demurrer adjudged for him; in these cases the defendant shall have return irreplevifable: for there can be no new replevin at common law, as upon a nonsuit, because the court have already given their judgment upon the legality of the caption. For if the property be in the defendant or a stranger, the plaintiff can have no cause to complain; and therefore to grant a new replevin, or, which is the same thing, not to make the return irreplevifable, would be to leave that same point open to an examination, which has already been determined: and no writ of second deliverance can be given by the statute, for that is



only upon a nonsuit. But, if the defendant pleads property in the plaintiff and *I. S.* which only abates the writ under the present form; or pleads *cepit in alio loco*, which abates the count, and, consequently, the writ; in these cases, as there can be no return without an avowry; so that return cannot, in the nature of the thing, be irreplevifable, because these pleas only abating the writ, must necessarily allow a writ under a better form. And it were a contradiction to allow a new replevin to the plaintiff for the same beasts, which the court have returned to the defendant irreplevifable. So, if the plaintiff confesseth the plea of the defendant to be true, the defendant shall have return, but not irreplevifable.]

Note, by the 17 *Car. 2. cap. 7.* that in an avowry for rent the writ of second deliverance is taken away. 2 Ld. Raym. 188. [3 Bl. Comm. 150.]

If the plaintiff in replevin be nonsuited for want of delivering a declaration, if it happened through any cause that would have entitled him to a writ of second deliverance, as sickness of the person employed, &c. the court will order the defendant to accept of a declaration on payment of costs; otherwise the plaintiff would be remediless, the writ of second deliverance being taken away by the 17 *Car. 2. cap. 7.* Vent. 64.

#### 4. Of the Writ *de proprietate probandâ*, and the Claim of Property.

[The writ *de proprietate probandâ* issues out of the Chancery, or out of *K. B.* or *C. B.* When it issues out of the Chancery, it is an original, and goes upon the sheriff's return to the *alias* replevin: when out of either of the other courts, it is judicial, and granted on the return of the *pluries*. The reason why these courts do not grant it till the *pluries* is, that the *pluries* only is returnable there, for the original and *alias* give no day, but are merely *vicontiel*.] Dy. 172-3.  
2 Salk. 583.  
Reg. 81.

If the defendant in replevin claims property, the sheriff cannot proceed; for property must be tried by writ. In this case therefore the plaintiff may have the writ *de proprietate probandâ* to the sheriff; and if it be found for the plaintiff, then the sheriff is to make deliverance; if for the defendant, then he is to proceed no further. But, as this is but an inquest of office, if it be found against the plaintiff, he may have a replevin to the sheriff; and if he return the claim of property, yet shall it proceed in the *C. B.* where the property shall be put in issue and finally tried. Co. Lit. 145. b.  
F. N. B. 77.  
Dyer 173.  
Com. 592.

None but he who is party to the replevin shall have the writ *de proprietate probandâ*; so that if upon a replevin the beasts of a stranger are delivered to the plaintiff, such stranger, being no party to the replevin, shall not have this writ. 14 H. 4. 25.  
2 Rol. Abr. 431.

The sheriff is to return the claim of property on the *pluries*, before which time the writ *de proprietate probandâ* does not issue, for it recites the *pluries*. Reg. 83.  
Com. 595.

The writ *de proprietate probandâ* is an inquest of office, and the sheriff is to give notice to the parties of the time and place of executing it. Dalt. Sh. 274.

If the defendant claims property in replevin, the plaintiff may have the writ *de proprietate probandâ* without continuance of the

replevin, though it be two or three years after, because by the claim of property the first suit is determined.

7 H. 4. 46.  
Com. Rep.  
594.

If the party who hath the cattle claims property, the sheriff cannot determine it without a writ *de proprietate probandâ*; and then, if the property be found for the party claiming it, it is but an inquest of office, and the party who made the plaint may after sue a writ of replevin, to which property may again be pleaded.

Cro. Eliz.

475.  
Winch, 26.  
Show. 402.  
Salk. 5.  
pl. 12.  
24. pl. 3.  
2 Ld. Raym. 984. 6 Mod. 81.

If the plaintiff has property, and omits to claim it before the sheriff, he may notwithstanding plead property in himself or in a stranger, either in abatement or in bar, though it was formerly held, that property in a stranger could only be pleaded in abatement.

Comb. 477.  
Barret v.  
Scrimshaw.

In replevin the defendant in his avowry pleads, that the beasts taken belong to a third person, and not to the plaintiff, and therefore prays a return; to which the plaintiff demurs; for on the avowant's own shewing he ought not to have return, having admitted the property of the beasts to be in another. But judgment was given for the defendant, for the prior possession was in him, and he hath a right against all others but the right owner, and the plaintiff by his demurrer hath admitted, that he hath no property in them.

6 Mod. 68:  
139.  
Leonard v.  
Stacy, and  
wife 2 Mod.  
242.

In trespass for entering the plaintiff's house, and taking away his goods, the defendant justifies by virtue of a replevin out of the sheriff's court in London, and a precept thereupon to J. S. an officer, and that he the defendant came in aid of him; plaintiff replies, that before the taking away the goods he claimed property in them, and gave notice thereof to the defendant; and the question upon a special verdict was, whether the taking away, after the claim of property, and notice thereof, did not make him a trespasser *ab initio*? And it was held *per tot. cur.* that he was a trespasser *ab initio*; for though the claim ought to be to the sheriff or officer, and a claim to a person that comes to his assistance be not enough to make the execution legal, if the officer does not desist; yet, if it be notified to him that comes in aid, that claim of property is made, he at his peril ought to desist.

Co. Lit. 145.  
b.  
1 Lev. 90.  
2 Keb. 441.

[A man cannot claim property in the county court by his bailiff or servant: and the reason is, for that if the claim fall out to be false, he shall be fined for his contempt, which the lord cannot be, unless he make claim himself: for *nemo punitur pro alieno delicto*. But in the king's bench one may make conusance and claim property by a bailiff; for *there*, the bailiff is not liable to a fine.]

### 5. Of the Writ *de returno habendo*.

35 H. 6. 40.  
Dyer, 280.  
Co. Lit. 145.

The *returno habendo* is a judicial writ, that lies for him who has avowed the distress, and proved the same to be lawfully taken; or where, upon the removal of the plaint into the courts above, the plaintiff, whose cattle were replevied, makes default, or does not declare or prosecute his action, and thereby becomes nonsuited, &c. And by this writ the sheriff is commanded to make a return of the cattle to the defendant in the replevin.

A bai-

A bailiff who makes conusance may have judgment of a return, Co. Ent. 59. and, consequently, a writ *de returno habendo* grounded on such judgment.

The writ *de returno habendo* is not a returnable process.

2 Roll. Abr. 433.  
F.N.B. 172.

If the defendant hath a return awarded to him, and he sueth a writ *de returno habendo*, and the sheriff returns on the *pluries*, *quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, &c. according to the statute of *Westm. 2. (13 Ed. 1. §. 1.)* and if they have nothing, then he shall have a *withernam* against the plaintiff's own cattle.

## 6. Of Returns irreplevifable.

Return irreplevifable is a judicial writ directed to the sheriff 2 Roll. Abr. 434. for the final restitution or return of cattle unjustly taken by another, and so found by verdict, or after a nonsuit in a second deliverance.

If the plea be to the writ, or any other plea be tried by a verdict, or judged upon demurrer, return irreplevifable shall be awarded, and no new replevin shall be granted, nor any second deliverance by the act of *Westm. 2. (13 Ed. 1. §. 1.)* but only upon a nonsuit. 2 Inst. 340.  
Dyer, 285.

If upon issue joined in replevin the plaintiff does not appear on the trial, being called for that purpose, yet return irreplevifable shall not be awarded, as in case of a verdict being given, but the party may have a writ of second deliverance, as well as if it had been a nonsuit before declaration or appearance. 3 Leon. 49.

If a man has return irreplevifable, and a beast dies in the pound, he may distrain anew. So, if the beast dies before judgment. Hob. 61.

If return irreplevifable be awarded, the owner of the cattle may offer the arrearages; and if the defendant refuse to deliver the distress, the plaintiff may have detinue, because the distress is only in nature of a pledge. Ld. Raym. 720.

## 7. In what Manner the Sheriff is to execute and return such Processes.

By the statute of *Westm. 1. (3 Ed. 1.) cap. 17.* if the party who distrains, conveys the distress into any house, park, castle, or other place of strength, and refuses to suffer them to be replevied, the sheriff may take the *posse com.* and on request and refusal may break open such house, castle, &c. and make deliverance; and this was a necessary law so soon after the irregular time of *H. 3.* 2 Inst. 193.  
5 Co. 93.  
Dalt. Sh. 573.

If the sheriff returns, that the beasts are inclosed in a park among savages, or in a castle, &c. he shall be amerced, and another writ of replevin shall be awarded; for he ought to have taken the *posse com.* for this was a denial. F.N.B. 157.  
Hale's Notes.

If the sheriff return, *quod mandavi ballivo libertatis*, &c. *qui nullum dedit mihi responsum*, or that the bailiff will not make deliverance of the cattle, these are not good returns; for, by the said statute *Westm. 1. (3 Ed. 1.)* the sheriff, upon such return made to him by the bailiff, ought presently to enter into the franchise, and make deliverance of the cattle taken. F.N.B. 157.

**F.N.B.158.** If a man sue a replevin in the county court without writ, and the bailiff return to the sheriff, that he cannot have view of the cattle to deliver them, the sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a jury, that the cattle are eloigned, &c. the sheriff in the county court may award a withernam to take the defendant's cattle; and if the sheriff will not award a withernam, then the plaintiff shall have a writ out of Chancery directed unto the sheriff rehearsing the whole matter, commanding him to award a withernam, &c. and he may have an *alias*, and after a *pluries*, and an attachment against the sheriff, if he will not execute the king's command.

**Bro. Retur. de Br. pl. 100.** If the sheriff return, *quod averia elongata sunt ad loca incognita*, this is a good return, and the party must pursue his writ of *withernam*; but, if the sheriff return *averia elongata ad loca incognita infra comitatum meum*, he shall be amerced, for the law intends that he may have notice in his county.

**Bro. Retur. de Br. pl. 125.** If in replevin the sheriff return, *quod averia mortua sunt*, this is a good return.

**Dalt. Sh. 556. (a) Allen. 33.** It is a good return, *quod nullus venit ex parte querentis ad monstranda averia (a)*. But it seems the sheriff is not obliged to require this.

**2 Roll. Abr. 552. Com. Rep. 596.** If the sheriff be shewn a stranger's goods, and he take them, an action of trespass lies against him, for otherwise the stranger could have no remedy; for being a stranger he cannot have the writ *de proprietate probanda*, and were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of all his goods. But *(b) Keilw.* seems to hold, that the action lies more properly against the person who shews the goods.

**(b) Keilw. 119.** If the sheriff come to make replevin of beasts impounded in another man's soil; if the place be inclosed, and have a gate open to the inclosure, he cannot break the inclosure, and enter thereby, where he may enter by the open gate; but, if the owner hinders him, so that he cannot go by the open gate for fear of death, he may break the inclosure and enter there.

**Id. Raym. 611. Lütw. 581.** The sheriff is to return, that the cattle are eloigned, or that no person came to shew, &c. or a delivery; but he cannot return, that the defendant *non cepit* the cattle, because it is supposed in the writ, and is the ground of it, which the sheriff cannot falsify.

## (F) Of what Property and for what Things a Replevin lies.

**Co.Lit.145.** **I**T is a general rule, that the plaintiff ought to have the property of the goods in him at the time of taking; yet, if the goods of a villain be distrained, the lord of the villain shall have a replevin, because the bringing the replevin amounts to a claim in law, and vests the property in the plaintiff. But in this case, if the goods of a villain be taken by a trespasser who claims property in them, the lord can have no replevin, because the villain had but a right.

Also

Also in a special case one may have a replevin of goods, though they were not distrained; as, if the mesne put in his cattle in lieu of the cattle of the tenant paravail, whom he is bound to acquit, he shall have a replevin of them. Co.Lit. 145.

If the lord distrains his tenant's cattle wrongfully, and afterwards the cattle return back to the tenant, yet the tenant shall have a replevin against the lord for those cattle, and shall recover damages for the wrongfully distraining of them, because he cannot have an action of trespass against his lord for that distress, but against a bailiff or servant he may. F.N.B. 69.

Not only a general property which every owner hath, but also a special property, such as a person has, who hath goods pledged to him, or who hath the cattle of another to manure his lands, &c. is sufficient to maintain a replevin (a). And in such like cases either party may bring a replevin. Co.Lit. 145.  
(a) Winch, 26.

A replevin does not lie of things which are *feræ naturæ*, as conies, hares, monkies, dogs, &c. but, if things wild by nature are made tame, or are reclaimed, so long as they continue in that condition, they belong to the person who has the possession of them, and he may bring a replevin. And the general rule herein seems to be, that a replevin lies for any thing that may by law be distrained. 2 Roll. Ab. 430.  
Godb. 124.  
4 Co. 54.

A replevin lies of a *leveret*; for it has *animus revertendi*. So, and for the same reason, it lies of a *ferret*: but it is said not to lie for a mastiff-dog, though an action of trespass will. Bro. Repl. 64. 2 Roll. Abr. 430.

Replevin lies of a swarm of bees. F. N. B. 68.

Replevin does not lie of trees, or timber growing; nor of things annexed to the freehold, because such things cannot be distrained; but a replevin lies of certain iron belonging to the party's mill. F. N. B. 68.  
4 Term Rep. 504.

[So, of a lime-kiln.]  
So replevin does not lie of deeds or charters concerning lands; for they are of no value, but as they relate thereto. Bro. Rep. 34.

Replevin lies not of money, nor of leather made into shoes. Moor, 394.  
2 Brownl. 139.

If a mare in foal, a cow in calf, &c. are distrained, and they happen to bring forth their young whilst they are in the custody of the distrainer, a replevin lies of the foal, calf, &c. Bro. Repl. 41.  
F.N.B. 69.  
Sid. 82.

Replevin lies for a ship: so, of the sails of a ship. March, 110.  
Raym. 232.

It was ruled by *Pollexfen*, C. J. upon evidence at *Guildhall*, in replevin for goods taken by order of the *East-India* Company from interlopers in the *Indies*, that no replevin lies for goods taken beyond the seas, though brought hither by the defendant afterwards\*. Show. 91.  
\* In those cases where replevin will not lie, the party may bring an action of detinue to recover the deeds, goods, &c. in specie.

## (G) Replevin, for and against whom it lies.

HEREIN the general rule is, that he who brings a replevin, must have a general or special property in him at the time, and that therefore a lord for a heriot, a parson for a mortuary, Plow. 281.  
Co.Lit. 145.

shall not have it before seifure; for the seifure vests the property in such cases.

**Bro. Repl.** An executor shall have a replevin of the taking of beasts in the lifetime of his testator; for this affirms the property to remain.

**F. N. B. 69.** If the cattle of a feme sole be taken, and afterwards she marry, the husband alone may have a replevin. But it hath been held, that in such case the wife cannot join, for that this action admits and affirms property in the feme at the time of the marriage, which by consequence must have vested in the husband.

**Bro. Bar. & Fem. pl. 85.** But of the taking of goods which a feme has as executrix, the husband and she may join in replevin.

**Pasch.** And in a late case where husband and wife brought a replevin, and concluded their declaration *ad damnum ipsorum*, defendant avowed for rent in arrear on a demise for years; plaintiff in bar of the avowry pleaded *non demisit*, and issue being joined on the demise, a verdict was found for the plaintiffs, and 1*s.* damages; and in arrest of judgment two objections were made, 1*st*, that husband and wife cannot join in replevin; 2*dlly*, that though they might join in an action, yet it cannot be laid to the wife's damage, she having no property in personal chattels during the coverture. In support of these exceptions were cited *F. N. B. 69. 1 Sid. 172.* because replevin admits and affirms property in the wife at the time of the marriage, which must necessarily vest in the husband; and the court can make no intendment, that they were joint-tenants before coverture, or that the feme had the goods as executrix: But *per cur.*—As to the first exception, though it be generally true, that husband and wife cannot have a joint property in personal chattels after marriage; yet, as a man and a woman may have a joint property before marriage, or the wife might have these goods as executrix, and the taking in both cases might be before marriage, we do not see why they may not declare jointly in an action for such taking; and, if the law will admit of such a joint action, the fact is admitted by the pleading; for the defendant has not made it a point of contest with the plaintiff, whose the property was at the time of taking; and therefore if there can be a case where husband and wife may join in an action for a personal chattel, we think, that after a verdict this ought to be intended that case. As to *F. N. B. 69.* the book says, the husband may have a replevin singly; but this does not prove he may not join his wife with him. And as to *1 Sid. 172.* we think the distinction there made not law, and that it is not necessary the husband should sue alone in such cases as affirm a property; but this is expressly contrary to the year-books, and to the opinion in *1 Vent. 261.* where it is held, they may join in detinue, which affirms property as well as replevin; for the specifick goods there are to be recovered. And as to the second exception, this must follow the fate of the first; for if the tort preceded the marriage, the action would survive; and *Cro. Eliz. 259.* is exprefs, that where damages may survive, they may be assessed to both.

If *A.* takes beasts by the command of *B.*, the replevin may be brought against both, or it may be brought against the commander only, as trespass may be. 2 Roll. Abr. 431.

If the beasts of several men be distrained, they cannot join in a replevin; so it is a good plea to say, that the property is in the plaintiff and a stranger, and where there be two plaintiffs, that the property is in one. Co. Lit. 115. 5 Co. 19. a. 38. b.

## (H) Of the Declaration in Replevin.

**I**T hath been holden by some opinions, that the count or declaration in replevin must be certain and particular in setting forth the numbers, kinds, and qualities of the cattle or things distrained; for that otherwise the sheriff cannot tell how to make deliverance of the same. Cater, 218. Co. 45.

As in replevin the plaintiff declared that the defendant took *centum oves matrices & vervoces* of the plaintiff's: after verdict for the plaintiff, exception was taken to the declaration, because it did not appear in the declaration how many ewes and how many wethers; and the sheriff is bound to make deliverance of either sort according to the writ; and though he may be informed by the party, so that it is a good return to say, that none came on the behalf of the party to shew the beasts, yet he is not bound to require it, but ought to have sufficient certainty within the record; and therefore judgment was given for the defendant; but it was agreed, that *oves* without addition had been good enough. Allen, 33. Stil. 71. S. C. Moor v. Cliptam.

But, notwithstanding this case, it seems to be now settled, that a declaration in replevin being certain to a general intent is sufficient, especially if it be after a verdict. 7 Co. 25. Show. 170.

As, where a replevin was brought *quare defend' cepit bona & catalla*, (viz.) *quandam parcell' lintei & quandam parcell' papiri*, defendant avowed for rent; and after verdict for the plaintiff, exception was taken in arrest of judgment, that the declaration was uncertain in not specifying the quantities contained in the parcels; and *Parker, Ch. J.*, who delivered the opinion of the courts said, that the declaration would undoubtedly have been ill on demurrer; but that the defendant having avowed the taking the goods in the declaration, the avowry had cured the defect, as thereby both parties were agreed what the goods were; and the defendant himself having prayed a return of them, there was no controversy between him and the plaintiff about them; and to oblige the plaintiff to a greater certainty, would have been of no service to the defendant; for if he had demanded 500 reams of paper, and proved only one, he must recover. And as to the difficulty of delivering the goods upon a *retorno habendo*, he said there was no weight in that objection; for the sheriff, when he came to make a return, might have the defendant's assistance to shew him which were the goods; and he was not obliged to execute the writ without somebody attended to point out the things he was to deliver; and in this case that of *Allen* 33. was fully considered, and over-ruled. Trin. 16. r. in B. R. Kempson v. Nelson, 5. C. 11. and approved by Lord Hardwicke, 6. C. 10. 1. Hardw. 121

2 Stra. 1015. So, in the case before-mentioned of *Bourne* versus *Mattaire*,  
 Pasch. where a replevin was brought for 14 skimmers and ladles; the  
 8 G. 2. in objection, that the plaintiff had not distinguished in his count  
 B. R. how many skimmers and how many ladles, was over-ruled.  
*Bourne* &  
 ux. v. *Mait-*  
*taire*. Ca. temp. Hardw. 119. S. C.

Cro. Eliz. The plaintiff in his count must allege the taking to be at a  
 896. Ward certain place, or according to the precedents, *in quodam loco vocat'*,  
 v. Saville, that the defendant may have notice to what he is to answer, and  
 Godb. 186. make his title; and therefore the alleging the taking *apud Dale*,  
 Brownl. or such a vill, is too general and uncertain.  
 176. & vide  
 Hob. 16.  
 Moor, 678. Raym. 34.

Carth. 186. In replevin both the vill and place are traversable.  
 Walton v. [The plaintiff declared for taking his cattle at *Market Street*,  
 Kerfop, and the defendant pleaded *non cepit modo* & *formâ*; at the trial the  
 2 Will. 354. plaintiff proved that the cattle were in the defendant's possession  
 at *Market Street*, where he was driving them to the pound: the  
 defendant proved that he first and originally took them at *Hard-*  
*hall*: it was thereupon insisted, that the plaintiff had not proved  
 the allegation in his declaration, that the cattle were taken at  
*Market Street*, for that the defendant had proved they were first  
 taken at another place, viz. at *Hardhall*. But the judge at the  
 trial, and the whole of Common Pleas afterwards, were of  
 opinion that this objection was groundless, because if the defend-  
 ant took them wrongfully at first, the wrong was continued to  
 any place where the defendant had them in his custody, and, con-  
 sequently, the place was well laid in the declaration.

Johnson v. Replevin in *London*: defendant appears upon an *elongata*:  
 Wollyer, plaintiff declares *quas in quodam loco vocat'* the *Minories* in *London*:  
 1 Str. 507, at defendant pleads *non cepit modo et formâ*: at the trial the plaintiff  
 Guildhall, proved the taking at *Rotherhithe* in *Surry*: upon which it was ob-  
 coram Pratt, jected, that the plaintiff had not proved his issue, for the place is  
 C. J.—This material, and therefore part of the issue under *modo et formâ*. The  
 case is treat- counsel for the plaintiff admitted, that it was traversable; but in-  
 ed by Wil- sisted, that by not traversing it particularly, the place was admit-  
 mot, C. J. ted, and could not be insisted on, upon *non cepit*. But the Chief  
 in the pre- Justice held, that where the defendant avows at a different place  
 ceding case in order to have a return, he must traverse the place in the count;  
 of Walton v. because his avowry is inconsistent with it: but, where he does  
 Kerfop, as a not insist upon a return, he may plead *non cepit*, and prove the  
 mere *nisi* taking to be at another place, for it is material. Whereupon the  
 prius note. plaintiff was nonsuited.]  
 But it does  
 not appear  
 here, as it  
 did in that  
 case, that  
 the goods  
 ever were in the place in which the declaration alleges them to have been.

F.N.B. 63. A man may count of several takings, part at one day and place,  
 in the notes and part at another day and place.  
 to the new  
 edition.

Bro. tit. Da- In replevin the plaintiff counted of four oxen taken at divers  
 magos, 42. times and places, and that delivery was made of two, but the other  
 two



two were withheld to his damage 10*s.* and this was held sufficient without any severance made as to the damages.

In replevin in *T.* the plaintiff declared of the taking of twenty beasts in *A.* and *B.*; & *per cur.*, he need not shew how many he took in one vill, and how many in another. Bro. Repl. 4*s.*

The count, as in other actions, must agree with the writ; so that if the writ is *de averiis*, and the count *de averiis* & *catallis*, this is ill. 3 Keb. 671. vide tit. Pleadings.

In replevin the writ was in the *detinet*, and the count in the *detinuit*, and this was thought to be a material variance: for in replevin in the *detinet* the plaintiff recovers as well the value of the goods, as damages for taking; but, when the writ and count are, that the defendant *detinuit* the goods against pledges, &c. by this it is implied, that the plaintiff has had his goods again; and for this he shall only recover damages for the taking. But the parties agreed to amend. 2 Lutw. 115.

## (I) Pleas in Replevin.

PLEAS in replevin are generally of four kinds; viz. either, 1*st*, pleas in bar; 2*d*, in justification; 3*d*, by way of conusance; 4*th*, by way of avowry. Vide 9 Co. 134.

In replevin the defendant may either justify or avow at his election, with this difference, that if he justifies, he cannot have a return. 3 Lev. 205. 2 Keb. 729.

The general issue in replevin is *non cepit*.

Vent. 249.

[One of several defendants may plead *non cepit*.]

2 Lutw. 1101.

If the defendant in replevin claim property to himself, or a stranger, above, as he may do; though it ought to have been before the sheriff, this does not amount to the general issue, but may be pleaded in bar or abatement; and if the plaintiff demur, the defendant shall have a return without avowing; for it appears the beasts are not the plaintiff's. But on issue *non cepit*, property cannot be given in evidence, for that were contrary to it. 2 Lev. 92. Vent. 249. Salk. 594. 6 Mod. 81. 103. 2 Ld. Raym. 984.

If the defendant in replevin make conusance as bailiff to *J. S.*, the plaintiff cannot traverse that he is his bailiff; for it is a matter of which by no intendment he can have knowledge. But, if in bar of the avowry the plaintiff pleads that another had made conusance as bailiff to *J. S.* for the same cause, and was barred, he need not shew that it was with the privity of *J. S.*, for it shall be intended; and if in truth it was without, the defendant may traverse his being ever his bailiff; but the law is, that the plaintiff in replevin may traverse his being bailiff. Cro. Eliz. 14. Vent. 314. 2 Lev. 210. & vide 3 Lev. 20. Salk. 107. Pl. 1. 49.

In a replevin against the master and bailiff or servant, if the bailiff makes conusance as bailiff, and the master pleads, that he did not take, the servant shall not have any return upon his conusance; for by the plea of the master his conusance is changed into a justification. 2 Roll. Abr. 433. Show. 169. cited.

In replevin for mare and colt the defendant pleaded not guilty of the taking within six years; and in support of this plea it was insisted upon, that it was the same in effect with the plea of *non cepit*, and that if the statute of limitations had destroyed the plaintiff's action as to the taking, the defendant could not be guilty Sid. 81. Arundell v. Trevil.

guilty of the detaining; and if this were not to be allowed, the statute would be evaded, and could never be a bar in replevin; but *per cur.* the plea is not good in not answering to the detainer; for it might happen that at the time of taking the mare the colt was not in being, but might have foaled in the pound; and a thing may be lawfully distrained, but unlawfully detained, as by being put into a castle, &c.

6 Mod. 103.  
Com. Rep.  
122. pl. 35.

*Prisel in auter lieu* is only matter in abatement, and the plaintiff may have a new writ without being put to his second deliverance.

Vent. 137.

In replevin of beasts taken at *D.* the defendant pleads in abatement, that they were taken at another place, *absque hoc* that they were taken at *D.* and *pro returno habendo* avows for rent on a lease for years, &c. the plaintiff replies and traverses the lease, &c. this is ill; for though the defendant, when he pleads in abatement, must also avow to have a return, yet the plaintiff cannot answer to it, but must take issue on the other matter.

### (K) Avowries in Replevin; and herein, of what Seisin and Services, and of the Certainty required therein.

*Vide Danv.*  
510.  
2 Co. 25.  
9 Co. 20.  
3 Co. 64.  
Vent. 99.  
Cro. Jac.  
160.  
Dyer, 280.

**A**N avowry, as has been before observed, is the setting forth, as in a declaration, the nature and merits of the defendant's case; and the shewing that the distress taken by him was lawful, which must be done with such sufficient certainty as will entitle him to *returno habendo*. But the cases on this head are of such different natures, that it is difficult to range them in any order: and as the niceties herein are in many instances remedied by late acts of parliament, it may be sufficient to take notice of those that follow.

Co. Lit. 268.  
(a) And though by the statute of 21 H. 8. c. 19. the lord need not avow upon any person in certain, yet he must allege seisin by the hands of some tenant in certain, within 40 years. Co. Lit. 65.

In an avowry for a distress for rent, the avowant was to shew a seisin, and such seisin by the statute 32 H. 8. c. 2. must be (a) alleged within 40 years next before the making of the avowry or continuance.

Bro. Avowry, 52.  
Roll. Abr. 314.  
3 Co. 65.

If a man makes a gift in tail, rendering rent, he may avow without laying any seisin, because the reversion gives him a sufficient privity, and he shall count upon the reservation, for that is his title; and where the commencement of the rent appears, seisin is not material.

8 Co. 64.  
Brownl. 169.  
Cooper v. Foster.

If *A.* by deed indented makes a feoffment in fee to *B.* and his heirs, rendering 10s. *per annum* to *A.* and his heirs, of which rent *A.* or his heirs have not been seised within 40 years, yet the heirs of *A.* may distrain, &c. for the statute must be intended in such cases only, where before the statute the avowant was obliged to allege a seisin, and that was where the seisin was so material, and of such force, that though it was by incroachment, yet it could not be avoided in an avowry.

So, this statute extends not to a new rent created by act of parliament. Cro. Car. 30.  
Jon. 233.

If homage be done to the lord, he may avow for all other services, superior as well as inferior, for in doing thereof the tenant takes upon himself to do all other services. 4 Co. 8.

Seisin of rent, suit, &c. which is annual, is a sufficient seisin of escuage, homage, fealty heriot service, service to cover the hall, and such other services as may not fall in 40 years. 4 Co. 8.  
Bevil's case.  
1 Lev. 21.  
S. P.

But seisin of one annual service is no seisin of another annual service; for in that case it is the folly of the lord if he hath not an actual seisin of the other service itself, when it becomes due yearly. 4 Co. 9.

If the avowant allege a seisin of the rent, this is a sufficient averment that he was seised of homage. Winch, 31.  
Hutt. 50.

If there be lord and tenant by fealty and rent, and the tenant make a lease for years, and though the lessor hath done fealty and constantly paid the rent, yet the lord distrains the cattle of the lessee for rent, (where in truth none is due,) and avows upon a mere stranger that never had any thing, as upon his very tenant, for rent arrear; upon the special matter shewn, the lessor may join in aid to the lessee, and abate the avowry, and compel the lord to avow upon his tenant in right and in law. 9 Co. 20, 21.  
2 Mod. 103.  
S. C. cited.

If there be lessee for years, and the reversion descend on a feme covert, and after the rent be arrear, and the baron distrain, and the lessee bring a replevin, the baron ought to avow in the name of himself and his wife, and not in the name of himself only, for the avowry is to be made according to the reversion which is in the feme. In this case, as reported in *Rolle*, a *quare* is made how this could be made good; but in *Cro. Jac. S. C.* the reason is given, because he had shewed the truth of the matter as it was, and had averred the life of the feme, and so the distress well taken, and the rent due to him; and therefore it was adjudged that the avowry was good. Roll. Abr.  
318. Cro.  
Jac. 442  
Wife v. Ten-  
ner; & vide  
Mod. 2 3.  
2 Saund.  
197.  
5 Mod. 73.

Coparceners are to join in an avowry for rent: so, of joint-tenants: but tenants in common are to sever in their avowries. Vide tit.  
Joint-  
tenants, Id.  
Raym. 64.

So, one tenant in common cannot avow the taking of the cattle of a stranger upon the land damage-feasant, without making himself bailiff or servant to his companion. Roll. Abr.  
320.  
Jon. 253.  
[2 H. Bl. 386. but] Cro Eliz. 530. contr.

A commoner may avow the taking of the cattle of a stranger upon the common damage-feasant, though he can have no action of trespass. Cro. Eliz.  
530.

Executors and administrators may distrain and avow in like manner, as their testators or intestates might have done, by the statute 32 H. 8. c. 37. 8 Co. 64.  
Sir William  
Foster's case.

If executors by the 32 H. 8. c. 37. avow for the arrears of a rent in fee accrued to their testator, they must shew that the land continues in the seisin of a tenant who ought to have paid it, or in the hands of some other who claims by or from him, according to the statute. Cro. Eliz.  
547.  
Co. Lit. 162.

Pool v.  
Duncombe,  
Tr. 1657,  
Bull. N. P.  
56.

[Tenant for life of a rent-charge confessed a judgment, and an *elegit* issued, under which the rent-charge was extended : tenant for life died, and the conufee distrained and avowed in replevin for the arrears incurred in the lifetime of the tenant for life : on demurrer it was holden to be a bad distress, and not warranted by the above statute : *1<sup>st</sup>*, Because the case of a conufee is not included in it : *2<sup>dly</sup>*, Because he comes in the *post*, not under the tenant for life.]

5 Co. 19.

In replevin against two, they make several avowries, *each in his own right*, and both avowries abated ; for, if both the issues should be found for the avowants, the court could not give judgment severally for the same thing.

Vent. 250.

If one distrain for rent, and before the avowry the estate on which it is reserved determine, the avowry shall be as if the estate on which it was reserved had continued, for the avowant is to have the rent notwithstanding ; but, if the distress were for a personal service, then the defendant must have a special justification, for he cannot have the service in *specie* when the estate is determined.

Cro. Car.  
260.  
Major v.  
Branwood.  
Hutt. 176.

Replevin of an ox taken, &c. the defendant makes conufance as bailiff to J. S., for that he was seised in fee of the manor of D., and that one D. was seised in fee of such a tenement holden of the said manor by rent and heriot service, payable after the death of the tenant, and that D. died possessed *de animalibus et catallis*, and because the heriot was not paid, he, by the command of the said J. S., distrained, and so made conufance, and the issue was upon the tenure, and found for the defendant. An exception was taken in arrest of judgment, because he does not shew what was the best beast which he demanded, nor the kind thereof, nor the price of it. But *per cur.* the avowry was held to be good ; for peradventure the avowant does not know what was the best beast ; and when the lord distrains, it is because the heriot is eloigned, and the plaintiff having done wrong by his eloignment, he at his peril ought to tender sufficient recompence.

Hob. 176.

But, when the defendant avowed for a heriot service, and the plaintiff pleaded in bar, that the tenant at the time of his death *nulla habuit animalia* ; on demurrer it was adjudged for the plaintiff, because the avowry was insufficient, for that it did not allege in certain what the heriot should be, *scil.* beast, or other thing.

Noy, 70.  
Bold v. Waters.

In replevin, the title was by a lease made by a parson, and the avowry was, that A. was seised of the rectory of H., and made the lease without shewing that he was parson : and by the court, that would have been a good exception, had it not been said in the avowry, that he was seised *in jure ecclesiæ*, which supplies all.

Cro. Car.  
104.  
Comb. 346.  
& vide  
1 Ld. Raym.  
154. 644.

If one avows for parcel of a rent, and does not shew how he was satisfied as to the residue, this has been held to be ill : in like manner it has been said, that an avowry for part of an annuity, without shewing how the rest has been discharged, is ill.

If *A.* holds lands of *B.* by certain rent, as of his manor of *D.*, and *A.* conveys those lands to the king, who grants them to *J. S.* in an avowry for this rent, *B.* must set forth the special matter, and not avow generally, because the place where, &c. is held of him as of his manor of *D.*, &c. for this is no rent-service, but rent distrainable of common right. Adjudged upon a demurrer, that such general avowry was naught in (a) substance, and not to be amended.

*vit.*, &c. but matter of form, Jenk. 338. Cro. Jac. 372. — *Adbuc a retro exiit*, but matter of form. Cro. Jac. 283. Dal. 72. — *bene cognoscit cap. præd. loco in quo*, &c. but *tempore in quo* omitted. 2 Mod. 4, 5.

And. 159, 160. Broker v. Smith. (a) For the several forms of an avowry, *vide* Co. Lit. 269. — *bene advo-*  
*cat*, &c. for *bene cogn-*

In an avowry for a rent-charge the defendant made a title to *Jane Stiles*, with whom he married *anno* 1603; and because at *Michaelmas* 1597, 20*l.* was arrear, and not paid to him and his wife, he avowed; and this was adjudged a good avowry; for the saying it was arrear to him and his wife, was but surplusage, when the contrary appears, he not being then married.

So, where the defendant made consuance as bailiff to *A.* administrator to *B.*, and it appeared that *A.* had a right, but not as administrator, and the consuance stood as bailiff of *A.*, and the rest rejected as surplusage.

Where an avowry is made for several rents, and it appears part is not due, yet the whole avowry shall not abate.

In avowry for rent, and so many hens for quit-rent, the avowant had a verdict for the whole; but it afterwards appearing upon the face of the avowry, that the hens were not due at the time of the distress, the avowant had leave to release his damages as to them, and take judgment for the rent, with his costs.

An avowant in replevin may abate his own avowry for part of the rent distrained for, but not after judgment.

In replevin *J. S.* avowed for a rent-charge, due *anno* 1660, and afterwards he distrained and avowed for another part of the same rent-charge, which became due before the said year, and which was against a different tenant: in this case it was held by three judges against *Mallet*, that the avowant was not estopped by his first avowry in such manner, as a lessor is by giving an acquittance for the last gale of rent, but that he may at his pleasure avow for part of his rent at one time, and for part at another, in the same manner as the lord may command his bailiff to distrain for so much rent, and afterwards for the sum due before.

In an avowry the defendant may say, that *B.* was seised of the place where, &c. and held the same of *A.* by fealty and rent, and so for rent arrear, as bailiff to *A.*, make consuance according to the statute, as in lands held of him; though it has been objected, that when in the beginning he names the tenant, he ought to go on in the same manner, and avow upon him as at common law \*.

services may avow generally. 14 G. 2. c. 19. s. 22. which *vide infra*.

If *A.* holds one acre by knight-service, and 12*d.* rent, and the other in socage and 1*d.* rent, and makes a gift in tail of both acres, without any express reservation of any tenure, the same tenures

Cro. Jac. 282. Bowles v. Poor. Bult. 135. S. C.

Hob. 208. Mo. 887. Brown v. Dunnery.

11 Co. 45.

Ld. Raym: 317. Carth. 437. S. C. Morris v. Gelder.

Com. Rep. 42. pl. 26.

Sid. 44. Raym. 211. Pamer v. Stabick.

Cro. Eliz. 146. Lacy v. Fisher. Leon. 302. S. C. \* Those who distrain for rent or

Co. Lit. 32.

tenures are by law created between the donor and donee; and though there is but one reversion, yet, because the tenures are several, the donor must make several avowries, for the avowry is made in respect of the tenures.

Roll. Rep. 35. \* He may now, if need require, avow double, by the stat. 4 Ann. c. 16.

A person cannot make one avowry both for a rent-service and a rent-charge, but he may avow the taking so many cattle for a rent-service, and so many for a rent-charge\*.

Bull. 101. 202.

And in a replevin for a colt and a cow, the defendant may avow for several heriots, and shew that the father of the plaintiff was seised, &c. and shew the several heriotable tenures, and death, &c. and that he took the colt and cow *nomine heriotorum*, without shewing which he took in respect of the one tenure, and which in respect of the other.

Macedonnel v. Wilder, 1 Str. 530. 8 Mod. 54. S. C.

[The defendant avowed for rent under a lease dated the 24th June, *habendum a præd. 24 Jun. &c. virtute cujus* the plaintiff entered the said 24th of June. On demurrer it was objected, that the plaintiff was a disseisor by entering the 24th, when the lease was not to commence till the next day, and, consequently, the possession was not under the lease, but by virtue of a tortious fee. But the court gave judgment for the avowant, for that there was a great difference between this case and an ejectment; for here, be the entry tortious or not, it does not discharge the contract for the payment of the rent.]

Com. Rep. 78. Carth. 44.

If a man takes a distress for a thing for which he had not good cause of distress, but had good cause of distress for another thing, if a replevin is brought, and he comes into court, he may avow for which thing he pleases.

Cro. Eliz. 547. Co. Lit. 102.

If executors by 32 H. 8. c. 37. avow for the arrears of a rent in fee accrued to their testator, they must shew that the land continues in the seisin of the tenant who ought to have paid it, or in the hands of some other who claims by or from him according to the statute; but in this case, because the avowant is a stranger, he need not shew in particular how, but only shew it generally according to the words of the statute.

Ld. Raym. 173. 2 Lutw. 127. S. C. Hoel v. Bell.

An executor of tenant for life of a rent-charge may, pursuant to the statute of 32 H. 8. c. 37. avow for the arrearages incurred in the lifetime of the testator, without averring that the place where, &c. was in the seisin of the plaintiff, or that he claims by, from, or under him that was tenant, and it will come more properly on the other side to shew the contrary.

Winch, 31. Hut. 50.

In an avowry for homage, it need not be shewn whether the tenancy came to the tenant by descent or purchase.

9 Co. 20. Mo. 870.

A stranger to an avowry can plead nothing in bar thereof but *hors de son fee*, or that which is tantamount; but the right heir, though he be a stranger to the avowry, being made a party by aid *prier*, may plead matter in abatement of the avowry.

Hob. 108. 109.

But at common law, where the avowry was made only on the land, as in case of customary profits, as, a fine for alienation, &c. so in case of a rent-charge, the plaintiff might have pleaded any discharge,

discharge, though he was a mere stranger, and had nothing in the land.

If a stranger claims a seignory, and distrains, and avows for the service, the tenant may plead that the tenancy is *extra feodum*, &c. of him, that is, out of the seignory, or not holden of him; but he cannot plead *extra feodum*, &c. unless he takes the tenancy upon himself.

Co. Lit. 1.  
—2 Mod.  
104. cited  
and there  
said by the  
Ch. J. that  
this rule is

to be intended in cases of an assise, and that so were all the books cited in Co. Lit. for proof of this opinion.

In an avowry the tenant cannot plead *ne unque seise* of such services generally, because he leaves no remedy for the lord either by avowry or by writ of customs and services, and therefore if he is a tenant in fee-simple, he ought either to disclaim or plead *hors de son fee*.

9 Co. 34.

If in (a) trespass for the taking of goods the defendant justifies by the command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for non-payment of the rent, he took them *nomine districtionis*, the plaintiff may reply, that the *locus in quo est extra, absque hoc quod est infra feodum*, &c. adjudged upon a special demurrer, it being shewn for cause, that the plaintiff had not taken the tenancy upon himself.

2 Mod 103.  
Sherrard v.  
Smith.  
(a) So, in  
an avowry,  
a stranger  
may plead  
generally  
*hors de son*  
fee, and so may tenant for years.

2 Mod. 104.

By the 21 H. 8. c. 19. all plaintiffs and defendants shall have like pleas and like aid *priers* in all such avowries, confurances, and justifications, (pleas of disclaimer only excepted,) as they might have had before the act.

Co. Lit. 268.  
Cro. Jac.  
127.  
Mo. 870.

If the defendant avows for, and alleges a seisin of rent payable at two feasts, the plaintiff may say that he holds by the same rent payable at one, *absque hoc* that it is payable at the two feasts, for this is another tenure.

9 Co. 34.

If in an avowry for rent the defendant alleges the tenure to be by fealty, rent, and suit of court, where the true tenure is by fealty and rent only, the seisin of the suit is not material; for the tenancy was not originally charged with any service of this nature, and therefore in this case the tenure is traversable \*.

Keilw. 31.  
9 Co. 35.  
Cro. Eliz.  
799.  
\* *Vide infra*.

But, when the lord gets quiet and peaceable seisin of more rent than is due, because the tenancy is charged with a service of such nature, the seisin is traversable, and not the tenure.

9 Co. 35.

But, unless the tenant (b) confess a tenure in part, he cannot traverse the tenure; for he cannot say he holds of a stranger, *absque hoc* that he holds of the avowant; but in that case he ought to disclaim, or plead *hors de son fee*.

9 Co. 35.  
(b) At com-  
mon law he  
could not  
have pleaded  
non-tenure

generally, and therefore he cannot, though the avowry be on the statute. Cro. Jac. 127.

But, in a *ne injuste vexes, cessavit*, assise, rescous, or trespass, such seisin of more rent shall be avoided, for the tenure, and not the seisin, is traversable.

9 Co. 34.

If the lord avows for services, and alleges seisin by the hands of any one in certain, as by the hand of his very tenant, the plaintiff may plead that the avowant was never seised by his hands.

9 Co. 35.

The

9 Co. 35. The seisin of that service is only traversable for which the avowry is made, unless the seisin of a superior service is alleged, which in law is a seisin of that.

Cro. Eliz. 524. The lord of a copyhold may avow in *B. R.* for a rent issuing out of a copyhold, for this is a duty due and payable at common law.

Dav. Rep. 2. In an avowry for *aid pur file marier*, or *faire fitz chevalier*, it is a good plea in bar to say, that the avowant had not such a son or such a daughter alive at the time of the aid levied.

Lev. 141. In replevin of a cow the defendant avows damage-feasant; the plaintiff prescribes for common for four cows and half a cow; issue on the prescription, and found for the plaintiff: it was moved in arrest, that the issue was senseless and void: but it was adjudged, that if in replevin so much of the prescription be found as will serve the party, though the whole be not found, it is sufficient; and here the action is for one cow only, and the prescription for four is a good justification for putting in one cow.

Pring v. Henley, per Ward, C. B. at Exeter, 1700, Bull. N. P. 59. [An avowant prescribed to have common for *all commonable cattle*, and upon issue joined thereon, he gave in evidence prescription for common for *sheep and horses only*: it was holden, that this did not maintain the issue, for a prescription is an entire thing. But, if he had had a general common, that is, for *all kinds of cattle*, and had prescribed for common for *any particular sort*, it would have been good, for it is within the general prescription.]

Hob. 73. In replevin the plaintiff entitles himself by a lease of the 3d of Lev. 141. *March*; the defendant traverses the lease *modo et formâ*; the jury find a lease of another date, yet judgment was given for the plaintiff; for the substance of the issue is, whether he has a lease or no: yet, if they had found a lease from another, it would not do; but, if he had declared thus in ejectment, it had been against him, for there he is to recover the term, and is to make his title truly.

Mod. 63. Where there is a custom for the lord to seize the best beast for an heriot, the lord in his avowry need not allege that the beast seized by him was the best; but this is a matter that must be shewn by the other side, and pleaded to the avowry.

Mod. 63. So, though the cattle of a stranger cannot be distrained unless they were *levant and couchant*, yet it must come on the other side to shew that they were not so.

4 Mo. 402. In replevin for taking *bona, catalla, et averia*, &c. the defendant made confession for taking *averia* only, for that a rent-charge of 100*l.* per annum was granted out of the lands, &c. payable half-yearly at *Michaelmas* and *Lady-day*; that the 33*l.* parcel of 50*l.* for half a year's rent being behind and unpaid, he distrained, and so justifies the taking, *et petit judicium*, &c.: upon demurrer to this avowry it was held to be insufficient, because it did not shew when the other 17*l.* were paid to make up the half-year's rent: besides, the action was brought for taking *bona, catalla, et averia*; and the defendant avowed the taking *averia* only, which is an answer only for the live cattle, and not for the whole; so that for these reasons the plaintiff had judgment.



In replevin for taking live cattle and several stacks of hay, &c., defendants plead *bene cognoscunt captionem averiorum et cattallorum in loco præd. quia dicunt quod averia præd. &c.* but say nothing as to the chattels; but they conclude and pray judgment *averiorum et cattallorum*; and this was held ill; for when they acknowledge the taking the whole, a justification as to a part cannot be a full and sufficient answer.

5 Mod. 77.  
Johnson v  
Adams et al.

The defendant in replevin cannot have a return of more cattle than he avows for.

Cro. Jac.  
611.

In an avowry the issue was, whether the place where, &c. was the freehold of the avowant or not; and it was found by the verdict, that it was the freehold of the avowant's wife; *et per cur.* it is found against the avowant; for when he saith *his* freehold, it is to be intended his sole freehold, and in his own right.

Cro. Eliz.  
524.  
Bonner v.  
Walker.

In replevin the issue was, whether the plaintiff held of the defendant such land by fealty of rent of 3s. 4d. and suit of court, and the avowry was for the rent. The jury found a special verdict, that the plaintiff held by fealty and rent only, and not by suit of court, &c. and if by this verdict the defendant shall have return, was the question; and the court held that it was found against the avowant, for in an avowry all the tenure alleged is material; but in trespass or rescous, if any part of the tenure be found, it is sufficient.

Cro. Eliz.  
799.  
Lewis v.  
Bucknall,

[The defendant avowed under a custom, that the lord of the manor was entitled, upon the death or alienation of every tenant, to the second best beast, and if but one, then to that beast; and if no beast, then to a compensation in lieu of it. Upon evidence the custom appeared to be as stated, but with an exception of mesne seignories, burgage-tenures, and alienations to the use of the alienees and their heirs: and the avowry for the omission of that exception was adjudged to be ill.]

Griffin v.  
Blanford,  
Cowp. 62.

In replevin the defendant avowed for rent, and shewed that his father was seised, and leased for years, &c., and that on his death the lands descended to him. The plaintiff in bar said, that the father devised the lands to J. S., and issue being joined herein, it was found by special verdict that the lands were holden by knight-service, so that the devise was only of two parts, and that the third descended to the heir at law, the avowant; and on (a) this finding it was held, that the avowant should have judgment.

Winch, 49.  
Clotworthy  
v. Mitchell.  
(a) Where  
there were  
two issues,  
and one only  
found for  
the avow-  
ant, he had  
judgment.  
Cro. Jac.

442.—Where the parties agree in the facts, the jury's finding otherwise not material.

2 Lutw. 1216.

An (b) avowry is in nature of a declaration, and it sufficeth if it be good to a common intent.

Icy, 77.  
(b) It must  
shew the

certainly of the place, day and cattle, to entitle the avowant to a writ of inquiry of damages.

The claim of right to distrain must be made out by the avowant against the plaintiff, who claims property in the distress.

6 Mod. 103.

6 Mod. 159. And there is no difference between an avowry and justification for whatever is set forth in either must be maintained.

Show. 402. The defendant in replevin, to entitle himself to a return of the goods distrained, must make his avowry, unless it be in such case in which he claims property; so that though the plaintiff's writ abates, yet the defendant is not entitled to a *retorno habend.* unless he had made his avowry.

Cro. Eliz. 530. The bailiff, who distrains for damage-feeasant in right of a devisee, must set forth what estate the devisor had; and it is not sufficient to say in general, that he was seised.

Carth. 9.— *Seisitus fuit* not sufficient in an avowry, but the party must set forth in fee, tail, for life, &c.

That the general rule of pleading is, that where a title is made under a particular estate, the commencement of that estate must be shewn, but that an estate in fee may be alleged generally. Carth. 445. Ld. Raym. 332. 2 Salk. 562. 6 Mod. 223. 2 Lutw. 1217. 1231. Comb. 27. 473. 476.

6 Mod. 158. If one avow for rent, he must shew his title and tenure in particular, and the defendant may traverse any part which he sets forth: *secus* for damage-feeasant.

But now by the 11 Geo. 2. c. 19. "It shall be lawful for all defendants in replevin to avow or make confession generally, that the plaintiff in replevin, or other tenant of the lands whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due, or that the place where the distress was taken was parcel of such certain tenements held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other services distrained for, were at the time of such distress and still remain due, without further setting forth the grant, tenure, demise, or title of such lessors or owners of such manor; and if the plaintiff in such action shall become nonsuit, &c. the defendant shall recover double costs."

McLeish v. Taite, Cowp. 781. [Where the rent reserved at the time of entering upon the premises was afterwards varied by agreement between the parties, yet it was holden, that the landlord might avow as on a demise at a rent certain, for that such subsequent agreement operated by relation to make it a reservation of the rent from the beginning.]

Sullivan v. Stradling, 2 Will. 208. The defendant may avow in this general manner, whether the plaintiff be tenant or not, for the words of the statute are in the disjunctive, "Plaintiff in replevin or other tenant."

Ibid. *Nil habuit in tenementis* is not pleadable to an avowry under the statute.

Lloyd v. Winton, 2 Will. 28. Heriot customs are not within this clause of the statute, which mentions services only, and therefore double costs were refused the avowant upon a nonsuit.

Sapsford v. Fletcher, 4 Term Rep. 311. To an avowry for rent by a tenant, his under-tenant may plead payment of the ground rent which he paid to the original landlord to protect himself from a distress: for that is a good payment of so much rent to the tenant, which is paid as part of the rent itself in respect of the land.

So, a tender and refusal may be pleaded to an avowry for rent, without bringing the money into court, because, if the distress was not rightfully taken, the defendant must answer the plaintiff his damages.

Bull. N. P.  
60.

But the plaintiff cannot plead a set-off, because this action is founded in a tort, and the 2 G. 2. does not extend to such actions. Another reason why it may not be pleaded is, because a set-off supposes a different demand arising in a different right. Neither can a mutual demand be given in evidence, where the defendant justifies under a distress.

4 Term Rep.  
510.  
Bull. N. P.  
181. 5th ed.

After an avowry for rent arrear, the plaintiff may pay the rent into court for which the defendant avows, because the demand is certain; but not where the damages are unliquidated.]

Vernon v.  
Wynne,  
1 H. Bl. 241.  
Barnes, 247.  
2 Salk. 596.

## [(L) Of the Judgment in Replevin.

ON the execution of the writ of replevin by the sheriff, the beasts distrained are actually returned to the plaintiff, so that he hath the possession and use of the cattle pending the suit; consequently if the plaintiff in replevin hath judgment, it can only be for damages; and therefore the entry is, "*quod* (the plaintiff) *recuperet versus* the defendant, *damna sua occasione præmissi, sed quia nescitur quæ damna præd.* (the plaintiff) *sustinuit occasione præmissi,* " a writ of inquiry is awarded to inquire; *quæ damna præd.* (the plaintiff) *sustinuit tam occasione præmissi, quam pro misis et custagiis suis, per ipsum circa sectam suam in hac parte appositis.* " And on the return of this inquisition, the plaintiff hath final judgment, *quod recuperet versus præfatum* (the defendant) *damna sua præd. ad, &c. per inquisitionem præd. in formâ præd. comperta, nec non, &c. eidem* (the plaintiff) *ad requisitionem suam pro misis & custagiis suis præd. per curiam hic de incremento adjudicata; quæ quidem damna in toto se attingunt ad, &c. præd.* (the defendant) *in misericordiâ."*

Glib. Repl.  
201. Co.  
Ent. 573. b.

2d Book of  
Judgment,  
203.

Carth. 362.  
5 Mod. 118.  
Salk. 205.  
Co. Ent.  
575. a.

This writ of inquiry must be understood to issue where the plaintiff hath judgment on a demurrer, &c. and not on a verdict; for if there be a verdict for the plaintiff, the jury on that verdict ascertain the damages that the plaintiff hath sustained by the unjust caption and detention, and also the costs of suit, and then there is no occasion for a writ of inquiry. The judgment is, "*quod* (the plaintiff) *recuperet versus* (the defendant) *damna prædicta per juratores prædictos in formâ prædictâ assessa, nec non, &c. —pro misis, &c. de incremento adjudicata, &c.—*And the defendant *in misericordiâ."*

On the other hand, if judgment be for the avowant on demurrer, then the entry is, "*quod* (the plaintiff) *nil capiat per breve suum præd. sed sit in misericordiâ pro falso clamore suo, & præd.* (the defendant) *eat inde sine die, &c. & habeat retortum averiorum præd. detinend. sibi irrepleg. in perpetuum, & quali-*

Co. Ent.  
572. b.  
2d Book of  
Judgment,  
205.

"ter, &c. vic. constare faciat hic, &c. & quod præd. (the defendant) damna sua occasione præmiss. recuperare debeat; sed quia nescitur," &c.

2d Book of  
Judgm. 206.

But if there be a verdict for the avowant, the jury in that verdict ascertain the damages, and then there needs no writ of inquiry; but the judgment is entered, "*quod* (the defendant) *habeat retortum averiorum prædictorum*, &c. *Consideratum est etiam quod præd. (the defendant) recuperet versus præf. (the plaintiff) damna sua præd.*, &c. *per juratores præd. in forma præd. assessa, nec non*, &c. *eidem (the defendant) ad requisitionem suam pro missis & custagiis*," &c.

2d Book of  
Judgm. 205.

So that wherever the judgment is given on a verdict, either for plaintiff or defendant, that verdict ascertaining the damages, there needs no writ of inquiry to issue; but, where the judgment is not founded on a verdict, but on a demurrer or *non proff.* of the plaintiff, &c. there, the damages must be ascertained by a jury on a writ of inquiry; because what damages either party hath sustained, is a matter of fact, and therefore to be settled by a jury. But, if both parties consent that the court shall settle the damages without a jury, then the entry is, "*super quæ justic. hic ad petitionem ipsius (the defendant) ex assensu præd. (the plaintiff) assident damna ipsius (the defendant) occasione præmiss.*, &c. *ultra missas*," &c. And this judgment is good, *quia consensus tollit errorem*.

Gamon v.  
Jones in  
error,  
4 Term Rep.  
509.

In an action against two defendants where one avowed and the other made cognizance for taking the distress for rent in arrear, and the plaintiff in his plea in bar said nothing was in arrear, on which issue was joined, the court held that a judgment entered that the defendant should have a return of the cattle, and recover his damages and costs assessed by the jury, was good, either as a judgment at common law, though the return be not adjudged irrepleviable, or as a judgment under 21 H. 8. c. 19. which entitles the defendants to damages and costs: because now in point of law the return is irrepleviable. Besides, it is an invariable rule, that if a judgment be more favourable for the plaintiff than he is entitled to, he cannot take advantage of it, because he is not injured by it.

By the 17 Car. 2. c. 7. it is enacted, that "wherever the plaintiff in replevin, upon a distress FOR RENT, shall be nonsuit before issue joined, in any court of record, the defendant making a suggestion, in nature of an avowry or cognizance for the rent in arrear, to ascertain the court of the cause of the distress,—the court, upon his prayer, shall award a writ to the sheriff, to inquire of the sum in arrear, and the value of the goods or cattle distrained. And that, upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of rent, in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount to that value, then so much as the value of the goods or cattle distrained shall amount unto, with his full costs of suit; and shall have execution for the same by *fieri facias*, "*elegit*,

"*elegit*, or otherwise." And by the same statute, the like proceeding may be had, where judgment is given for the avowant, or for him that maketh cognizance for any kind of rent. And it is thereby further enacted, that "in case the plaintiff shall be nonsuit after cognizance or avowry made, and issue joined, or if the verdict shall be given against the plaintiff, then the jurors that are impaneled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum in arrear, and the value of the goods or cattle distrained. And thereupon the avowant, or he that maketh cognizance, shall have the like judgment," &c. as before (a).

(a) In the cases of *Valentine v. Faucet*, 2 Str. 1021. and in *Ca. temp. Hardw. 138*. *Ld. Hardwicke* laid it down, that in every case, unless where the court is tied

up by this statute, a writ of inquiry may be granted in order to do complete justice.

If the plaintiff be nonsuited, the defendant is not bound to proceed by writ of inquiry under the above statute of 17 Car. 2. c. 7. but may, if he pleases, bring his action against the plaintiff and his sureties on the replevin bond.

*Waterman v. Yea*, 2 Will. 41.

If he does proceed under the statute by suing out a writ of inquiry, and also a *retorno habendo*, a writ of second deliverance will be a *superfedeas* to the latter, but not to the former; so that the plaintiff shall have his cattle, and the defendant his arrears, costs, and damages, by virtue of the proceedings under the statute.

*Cooper v. Sherbrooke*, 2 Will. 110.

For the damages are not for the things avowed for, but are given by stat. 21 H. 8. c. 19. as a compensation for the expence and trouble the avowant has undergone; and therefore, though the writ of second deliverance supercedes the effect of the defendant's judgment or nonsuit, viz. a return of the goods, yet the damages still continue. *Sed quære*, if under the writ of inquiry, the defendant shall not recover all the rent avowed for, besides his costs and damages? For *per Bathurst, J.*, By this statute the legislature intended, that the proceeding by writ of inquiry, *fieri facias*, and *elegit*, should be final, for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a *retorno habendo*, which is the right judgment; for the statute hath not altered the judgment at common law, but has only given a farther remedy to the avowant.

1 Salk. 95. *Carth. 253*.

*Espin. 377*.

2 Will. 117.

Where a defendant avowed for a year's rent, and had a verdict, but no value being found by the jury, a motion was made to the court for a rule to shew cause why a writ of inquiry should not issue under 17 Car. 2. c. 7. to ascertain the amount of the rent in arrear, and the value of the cattle distrained? *Gould, J.* doubted whether it could be granted to supply a defective verdict in case of rent, though he held that after judgment by default, it certainly would lie; and added, that *Burrow's* note of the case of *Andrews v. James*, M. 24 G. 2. B. R. which was cited in favour of the rule, stated that to be a judgment by default. However, no cause being shewn, the rule was made absolute.

*Freeman v. Lady Archer*, 2 Bl. 763.

Carth. 255. The defendant had judgment upon demurrer for a return irreplevifable, as at common law, upon which a writ of inquiry was awarded pursuant to the statute. And on error brought, it was objected, that when the defendant proceeds on the statute, he ought not to have judgment for a return; but the court held that the judgment was well given, for the reasons before mentioned.

Ca. of Prac. But, where the defendant pleaded *non cepit*, and after obtaining  
in C. P. 42. judgment of *retorno habendo*, procured a writ of inquiry of damages to be executed,—the court set aside the writ of inquiry, and the inquisition taken thereon, because there had been no avowry; for the avowry, which is in the nature of a declaration, is the only ground of an inquiry for the defendant in replevin.

1 Lev. 255. Where the jury who try the issue, omit to inquire of the rent in arrear, pursuant to the statute, no writ of inquiry can be AFTERWARDS awarded to supply the omission; and therefore, in such case, the defendant must pursue the common law judgment of *retorno habendo*.

Carth. 362. But, where the defendant avows, as overseer, for  
3 Wils. 442. a poor's rate, under the 43 *Eliz. c. 2.* and the plaintiff is nonsuit, or a verdict passes against him, and the jury are discharged without inquiring of the treble damages, given by that statute to the defendant, the defect may be cured by a writ of inquiry; because such inquiry is no more than an inquest of office.

Rees v. Morgan in error,  
3 Term Rep. 349. If the jury find a verdict for the defendant with damages, without finding either the amount of the rent in arrear, or the value of the distress, the defendant may take a judgment *pro retorno habendo*; or he may amend the judgment for the damages, even after the record is removed into a court of error, by substituting a judgment for a *retorno habendo*: and if he neglects making such amendment, a court of error, though it reverse the judgment for the damages, will award a judgment for a *retorno habendo*, and give the defendant costs up to the time of the judgment in the court below.

James v. Moody,  
1 H. Bl. 282. Where the plaint in replevin was removed by the defendant into the court of *C. B.* from an inferior court by a *recordari facias loquelam*, which was filed on the appearance day of the return, and a rule to declare was given, the court held, that the defendant might sign a judgment of *non prof.* for want of a declaration, without demanding a declaration, as in other actions.]

## Rescue.

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- (A) What it is, and of what Things it may be.
- (B) In what Cases a Rescue may be justified.
- (C) Of the Offence of making a Rescue, and how the Offenders are to be proceeded against.
- (D) The Form of the Proceedings on a Rescous.
- (E) Of the Return of a Rescous: And herein,

- 1. In what Cases the Sheriff may return a Rescous; and therein, of the Difference between a Rescous on Mesne Process and Execution.
- 2. Of the Form of the Return, and for what Defects it may be quashed.
- 3. Whether the Sheriff's Return of a Rescue be traversable.

- (A) Rescue, what it is, and of what Things it may be.

**R**ESCUE is the taking away and setting at liberty against law a distress taken for rent, or services, or damage-feasant. But the more general notion of a rescous is, the forcibly freeing another from an arrest or some legal commitment, which being a high offence, subjects the offender not only to an action at the suit of the party injured, but likewise to fine and imprisonment at the suit of the king. Co. Lit. 160.  
F. N. B. 226.

If a man distrain cattle, and as he is driving them to the pound they go into the owner's house, and he refuse to deliver them, this is a rescue in law. Co. Lit. 161.

But here we must observe, that there can be no rescous but where the party has had the (a) actual possession of the cattle or other things whereof the rescous is supposed to be made; for if a man come to arrest another, or to distrain, and be disturbed (b), regularly, his remedy is by action on the case. Co. Lit. 161.  
a. Lit. Rep. 296.  
Hutl. 145.

*quod arreftavit*, and quashed, because not said *et in custodia habuit*. Sid. 332. (b) That it is a contempt of the court, and punishable as a misdemeanor. 6 Mod. 210. (a) A rescue was returned

If upon a *fieri facias* the sheriff seizes goods which are taken away by a stranger, this is not properly a rescue; for by the seizure of the goods, by virtue of the *fieri facias*, the sheriff has a property in them, and (c) may maintain trespass or trover for them: also, Hutl. 145.  
Lit. Rep. 296.  
Sheriff of Surry v.

Alderton, the party injured may have an action on the case against the wrong-  
 (c) For this doer.  
 4 de Cro.  
 Eliz. 639. 2 Saund. 411. Vent. 52.

Vent. 21. If upon a *fieri facias* the sheriff return that he had seized the  
 2 Saund. goods, but that they were rescued by B. and C., &c. this is not a  
 343 good return, but he shall be amerced: the party also, at whose  
 Show. 180. suit the execution issued, may charge him by *scire facias* for the  
 \* This is value of the goods\*.  
 not like  
 mesne pro- cess, because in cases of executions the sheriff may take the *posse comitatus*.

## (B) In what Cases a Rescue may be justified.

Co. Lit. 47. IF the lord distrain for rent when none is due, the tenant may  
 160. b. lawfully make rescue: so may a stranger, if his beasts be dis-  
 161. a. trained when no rent is due. So, if the tenant tender the rent  
 when the lord comes to distrain, and yet he do distrain, or if  
 he distrain any thing not distrainable, as beasts of the plough, when  
 other sufficient distresses may be taken, the tenant may make rescous:  
 so may he, if the lord distrain in the highway or out of his fee.

Salk. 247. But, though there must be reason for the distress, and that  
 pl. 2. otherwise the rescue cannot be unlawful; yet, it hath been held  
 Id. Raym. in a *parco fracto*, that the defendant cannot justify breaking the  
 104. pound and taking out the cattle, though the distress was without  
 Cottworth cause, because they are now in the actual custody of the law.  
 v. Bectson.

Co. Lit. 161. There is a difference between a man's being arrested by a war-  
 Vid. 5 Co. 68. rant on record, and by a general authority in law; for, if a *copias*,  
 Mackailey's be awarded to the sheriff to arrest a man for felony, though he be  
 case. innocent, he cannot make rescue. But, if a sheriff will, by the  
 6 Co. 54. general authority committed to him by law, arrest any man for  
 Cro. Jac. felony, if he be innocent, he may rescue himself (a).  
 486.

[(a) But, such arrest *virtute officii* being made on a just ground of suspicion of felony, the party rescues himself at his  
 peril; for, according to Lord Hale, if in the attempt to make the rescue he is upon necessity slain, it is  
 no felony in the officer; and, upon the same principle, if the officer is killed, it will be murder. 2 H. H.  
 P. C. 85, 86, 87. 92, 93. The obvious reason is, that the law makes it a duty in the sheriff and cer-  
 tain other officers to arrest for felony, on just suspicion; and therefore rescue from such an arrest is re-  
 sistance of lawful authority. If this be so, Lord Coke is here too unqualified in his expression. Co.  
 Lit. 162. a. n. 3. 13th edit.: and it hath been lately adjudged, that where a person is directly charged  
 with a felony, peace officers are justified in arresting him without any warrant, though it should afterwards  
 turn out that no felony hath been committed. Samuel v. Payne, Dougl. 359.]

## (C) The Offence of making a Rescue, and how the Offenders are to be proceeded against.

Hal Hist. IT seems agreed, that the rescuing of a person imprisoned for  
 P. C. 606. felony is also felony by the common law.

Stamf. P. C. Also it is agreed, that a stranger who rescues a person com-  
 12. mitted for, and guilty of high treason (b), knowing him to be so  
 Jon. 455. committed, is in all cases guilty of high treason.  
 (b) Whether he knew that the prisoners were so committed or not. Cro. Car. 583.

Hal Hist. To make a rescue felony, the following rules are laid down by  
 P. C. 606. Lord Chief Justice Hale: 1st, That it is necessary that the felon  
 3 L. 3. be



be in custody or under arrest for felony; and therefore if *A.* hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and *A.* shall be fined for the hindrance of his taking. But it is not felony in *A.* because the felon was not taken. Coron. 333.  
Stamf. 31.

So, to make a rescue felony, the party rescued must be under custody for felony or suspicion of felony. And it is all one whether he be in custody for that account by a private person or by an officer, or warrant of a justice; for, where the arrest of a felon is lawful, the rescue of him is felony. But, it seems necessary that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person. Hal. Hist.  
P. C. 606.

But, if he be in custody of an officer, as constable or sheriff, there, at his peril, he is to take notice of it; and so it is if there be felons in a prison, and *A.* not knowing of it, break the prison and let out the prisoners, though he knew not that there were felons there, it is felony. Hal. Hist.  
P. C. 606.  
Cro. Car.  
583.

A person committed for high treason, who breaks the prison and escapes, is guilty of felony only, unless he lets others also escape whom he knows to be committed for high treason; in which case he is guilty of high treason, not in respect of his own breaking of prison, but of the rescous of the others. 2 Hawk.  
P. C. c. 21.  
§ 7. c. 18.  
§ 17.

If the person rescued were indicted or attainted of several felonies, yet the escape or rescue of such person makes but one felony. Hal. Hist.  
P. C. 599.

Wherever the imprisonment is so far groundless or irregular, or the breaking of a prison is occasioned by such a necessity, &c. that the party himself breaking prison is either by the common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offence, a stranger who rescues him from such an imprisonment is in like manner also excused; *et sic è converso*. 2 Hawk.  
P. C. c. 21.  
§ 2.

A return of a rescue of a felon by the sheriff against *A.* is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute 25 *E. 3. c. 4*. Hal. Hist.  
P. C. 606.

As in case of an escape, so in case of a rescue, if the party rescued be imprisoned for felony, and be rescued before indictment, the indictment must surmise a felony done, as well as an imprisonment for felony or suspicion thereof. But, if the party be indicted, and taken by a *capias*, and rescued, then, there needs only a recital that he was indicted *prout* and taken and rescued. Hal. Hist.  
P. C. 607.

But, though the rescuer may be indicted before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attainted. But, (*a*) if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for that in high treason all are principals. Also, it seems, that he may be immediately proceeded against for a misprison only, if the king please. Hal. Hist.  
P. C. 607.  
(a) 2 Hawk.  
P. C. c. 2.  
§ 3.

The rescuer of a prisoner for felony, though not within clergy, yet shall have his clergy. Hal. Hist.  
P. C. 607.  
As those

who break prison are punishable, as for a high misprison by fine and imprisonment in those cases, wherein they are saved from judgment of death by the statute *de frangentibus prisonam*; so also are those who rescue such prisoners in the like cases, in the same manner punishable. 2 Hawk. P. C. c. 21. f. 6.

See also

9 G. 1. c. 28.

by which

the rescuing

persons ar-

rested in the

minut, &amp;c. is made felony.\*

or surgeons,

felony within

any person

committed for

under the act

By the 6 Geo. 1. c. 23. § 5. it is enacted, That if any person shall rescue felons ordered for transportation, or assist them in making their escape, he shall be guilty of felony, and suffer death without benefit of clergy.

\* Rescuing the body of offender executed for murder from the sheriff or surgeons, felony within clergy, by 25 Geo. 2. c. 37. f. 10.—But it is felony without clergy to rescue any person committed for or found guilty of murder, or going to execution, or during execution. *Id.* f. 9.—So as to persons transported, for rescuing the body, returning *Id.* f. 10.—So rescuing offenders under the act called the Black Act, *see* 9 Geo. 1. c. 22.

Co. Lit. 161.

Co. Ent. 614.

Rast. Ent.

577.

(a) For this

vide F. N. B.

226.

A writ of

rescous

against the

father and

son, the fa-

ther for rescuing the son, and the son for rescuing himself.

9 Co. 12. b.

to bring an action on the case against him as the better way.

Cases in B. R. 556.

shall be doubly punished, for upon the return of the sheriff he shall be fined to the king, and an attachment shall issue out against him.

3 Bullst. 201.

[There must be a return. 1 Str. 531.]

all returns of a rescous, process of outlawry lies.

13 H. 7. 21. pl. 5.

2 Inst. 665. cont. Fitz. Process 56.

213. 29 E. 3. 18.

As the offence of rescuing persons in cases of treason and felony is usually punished by indictment, so the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a (a) writ of rescous or a general action of trespass *vi et armis*, or (b) an action on the case, in all which damages are recoverable. Also, it is the frequent practice of the courts to grant an (c) attachment against such wrong-doers, it being the highest violence and contempt that can be offered to the process of the court.

7. Bullst. 137.—In rescous the writ is conceived on the special matter. (b) On a motion for an information against one for rescuing a person from the sheriff in the Temple, the court advised them to get the rescous returned, and to bring an action on the case against him as the better way. Cases in B. R. 556. (c) A rescuer shall be doubly punished, for upon the return of the sheriff he shall be fined to the king, and an attachment shall issue out against him. 3 Bullst. 201. [There must be a return. 1 Str. 531.]—On all returns of a rescous, process of outlawry lies. 13 H. 7. 21. pl. 5. 2 Inst. 665. cont. Fitz. Process 56. 213. 29 E. 3. 18.

22 E. 3. 13.

3 Inst. 141.

He who rescues a prisoner from any of the courts of *Westminster-hall* without striking a blow, shall forfeit his goods and the profits of his lands, and suffer imprisonment during life; but not lose his hand, because he did not strike.

Cro. Jac.

486.

Hob. 180.

It is clearly agreed, that for a rescous on mesne process, the party injured may have either an action of trespass *vi et armis*, or an action on the case, in which he shall recover his debt and damages against the wrong-doer; and the rather, because on (d) mesne process he can have no remedy against the sheriff.

(d) Vide

post.

Hert. 95.

Cro. Car.

109.

Hutt. 98.

Hob. 180.

Also it hath been adjudged, that for the rescous of a person in execution on a *capias salis*, or *capias utla*, an action will lie against the rescuer, though the party injured hath his remedy against the sheriff, and the sheriff hath his remedy over against the wrong-doer; for perhaps the sheriff may be dead or insolvent. But herein it hath been held, that if he bring his action against the party who made the rescue, he may plead it in bar to an action brought by the sheriff: so, if against the sheriff or his bailiff, they may plead that he had satisfaction from the party, so that if he recovers against one, the other is discharged.

By the statute 2 W. & M. stat. 1. cap. 5. § 5, it is enacted, "That upon pound-breach or rescous of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use."

Salk. 205.

pl. 2.

Ld. Raym.

In an action upon the case for a rescous, upon this statute it hath been held, that the plaintiff shall recover (e) treble costs as well

well as treble damages, for the damages are not given by the statute but increased; an action on the case lying for a rescous at common law.

19. Skin. 555. pl. 4. Carth. 321. Lawton v.

Storie. [(c) But, to entitle him to recover, he must shew that he has complied with the directions of the statute, and conclude *contra formam statuti*. Anon. 1. Ld. Raym. 342.]

An attachment will be granted not only against a common person, but even against a peer of the realm, for rescuing a person arrested by due course of law; so that if the sheriff shall in any case return to the court, that the person arrested, or goods seized, or possession of lands delivered by him, by virtue of the king's writ, were rescued or violently taken from him, &c. they will award an attachment against the rescuers.

Dyer, 214. 2 Jon. 33.

But herein it seems to be the practice of late, not to grant an attachment in any case for a rescous, unless the officer will (a) return it, for that it hath been found by experience, that officers will often take upon them to swear a rescous where they will not venture to return one.

2 Hawk. P. C. c. 32. § 34. (a) A distinction between a rescous on

mesne process and upon a writ of execution; in which last it was said by Holt, Ch. J., the sheriff could not return a rescous; and therefore the court can have no other ground for an attachment but affidavits, and ought to be contented therewith; but on mesne process, a rescous may be returned, which being matter of record, and by consequence, a better motive, ought to be given to the court. 6 Mod. 141.

In a late case, a distinction was taken where an attachment is prayed for a rescous in the first instance, and where a rule to shew cause is only asked; in this, affidavits of the fact are sufficient; in the other case, the sheriff's return is requisite.

Trin. 5 G. 2. in B. R. Young v. Payne.

Where, upon the return of a rescue, an attachment is granted, and the party examined upon interrogatories, upon answering them, he shall be discharged. But, if the rescous is returned to the filazer, and process of outlawry issues, and the rescuer is brought into court, he shall not be discharged upon affidavits.

2 Salk. 586. pl. 1. Rex v. Belt. — Said by Sir Sam. Astly to be the constant

course upon the return of a rescue, to set four nobles fine upon each offender. 2 Salk. 586. pl. 3. 2 Jon. 198. *accord.* [This is not so; the fine is discretionary. Rex v. Elkins, 2129. — The attachment must be returnable at a general return. Rex v. Wilkins, Stra. 624. — The rescuers, on submitting to a fine, may be permitted to read affidavits to shew, there was not any real arrest. Rex. v. Minify, Stra. 642. — The sheriff's return of a rescue, is of itself a conviction of a rescue, and process immediately issues from the Crown-office against the rescuer. Rex v. Pember, Ca. temp. Hardw. 112. — Return of rescous is not traversable, and the rescuer must be brought into court to be fined. Barnes, 429. and not being traversable, the offender shall be punished without being examined upon interrogatories. 4 Burr. 2129. — The rescuer may be admitted to give recognizance, to try false return against the sheriff. Barnes, 430. — If there is a verdict for the plaintiff the recognizance shall be discharged. *Ibid.*]

[By stat. 8 & 9 W. 3. c. 27. § 14. the rescuer of any person arrested upon civil process within the pretended privileged places therein mentioned, and any person aiding, abetting, or assisting the same, shall, being lawfully convicted thereof, forfeit to the plaintiff in the action 500 l., to be recovered by action of debt, &c. and if after such recovery he shall neglect to pay the money recovered with full costs of suit within one month after judgment signed thereupon, and demand made, he shall, upon producing a copy of the judgment, and oath made that the money recovered is not paid, by order of the court wherein he was convicted of the rescue,

rescue,

rescue, be transported for seven years. And any person convicted of receiving or concealing such rescuer, shall be likewise transported for seven years, unless within one month after his conviction he shall pay to the plaintiff in the action the full debt or duty for which the action was brought, with full costs.]

### (D) The Form of the Proceedings on a Rescous.

Dyer, 164.  
— That no  
defect can  
be aided by  
the verdict.

**A**N indictment of a rescous ought to set forth the special circumstances of the fact with such certainty, as to enable the defendant to make a proper defence.

Rol. Abr. 781.

Moor, 555.  
Hast. Ent.  
263.

And therefore, if an indictment lay the offence on an uncertain or impossible day, as, where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day as makes the indictment repugnant to itself, it is void.

Dyer, 164.  
pl. 60.

Where an indictment of rescous set forth that *J. S.* committed such a felony, such a day and year and place, *per quod A. B. prædictum J. S. cepit et arrestavit, et in salva custodia sua ad tunc et ibidem eundem J. S. habuit et custodiivit*, it is made a *quare* whether the indictment be not insufficient, because no time of the arrest is alleged in the same sentence with it; and it is doubtful whether the time of the custody, which is alleged in the next sentence by force of the copulative, be applied also to the arrest or not; and *Dyer* seems rather to incline to the contrary opinion.

Dyer, 164.

Also it is held in *Dyer*, that an indictment of a rescous is not good without expressly shewing the day and year both of the arrest and also of the rescous, and that the time of the latter is not sufficiently shewn by shewing that of the former.

Cro. Jac.  
345.  
2 Bulst. 208.  
S. C. Cram-  
lington's  
case.

But it hath been since adjudged, upon exceptions taken to an indictment for a rescous, that it was not necessary to allege the place where the rescue was made, and that it should be intended, that where the arrest was, there also was the rescue without the word *ibidem*.

Cro. Jac.  
345.  
— The same  
exception

An exception taken to an indictment of rescous, that it wanted the words *vi et armis* or *manu forti*, but over-ruled, it being held by the court that the word *recussit* implies it to be done by force.

taken in Cro. Jac. 473, over-ruled, and there held, that though it were error at common law, yet it is made good by the statute 37 H. 8. c. 8.

Cro. Jac.  
472.  
Hart's case.

An exception taken to an indictment of a rescous from a serjeant at mace, who had taken a man on a plaint in *London*, because it did not set forth that the person was taken by virtue of any warrant; but it being alleged that he was lawfully arrested, it shall be intended by a good warrant.

2 Inst. 665.  
2 Show. 84.  
pl. 72.

It is said that an indictment of rescous is not within the statute of additions, and that the naming the person indicted of such a parish, without giving him any title, is sufficient.

Rex v. Freeman, 2 Str.  
1226.

[In an indictment for a rescue from the house of correction, it must appear for what the prisoner was committed there, so as to

make the house of correction a proper prison which *prima facie* it is not for all offences. Besides, on so general a charge, the court cannot judge of a proper punishment.]

Note; upon an indictment of rescous, if it were upon an arrest upon mesne process, and the party has appeared, the court will be easily induced to quash it: so if it be on process out of an inferior court, though the party has not appeared; for no aid is given to inferior jurisdictions.

In an action for a rescue the plaintiff must allege in his declaration all the material circumstances; as that such a writ issued, that he was arrested in custody, and that he was rescued, &c.

In an action on the case for a rescous on mesne process, the evidence was, the bailiff stood at the street door, and sent his follower up three pair of stairs in disguise with the warrant, who laid hands on the party, and told him that he arrested him; but he with the help of some women got from the follower and ran down stairs, and the defendant hearing a noise ran up, and put the party into a room, locked the door, and would not suffer the bailiff to enter. *Holt*, Ch. J., doubted whether this was a lawful arrest, being by the bailiff's servant, and not in his presence (a); but said, that the plaintiff must prove his cause of action against the party, that he must prove the writ and warrant by producing sworn copies of them; he must prove the manner of the arrest, that it may appear to the court to be legal, and, in point of damage he must prove the loss of his debt (b), viz. that the party became insolvent, and could not be retaken.

Godb. 125.  
Lutw. 130.

6 Mod. 211.  
Wilson v. Gary.  
[(a) The arrest must be made by the authority of the bailiff, but he need not be the hand that arrests, nor in the presence, nor actually in sight, nor within any precise distance, of the person arrested.]  
Espin. 657.]

rested. *Blatch v. Archer*, Cowp. 65. (b) This, though *expedient*, is not *necessary*.

## (E) Of the Return of a Rescous: And herein,

1. In what Cases the Sheriff may return a Rescous; and therein, of the Difference between a Rescous on mesne Process and Execution.

THE distinction herein laid down in a variety of books and cases is, that on a rescue on mesne process the sheriff may return the rescue, and is subject to no action; for that on a mesne process he was not (c) obliged to raise his *posse comitatus*, nor would it be convenient so to do on the execution of every mesne process.

Cro. Eliz. 863.  
March, 1.  
Jon. 201.  
3 Bull. 198.  
Roll. Rep. 389.

Noy 40. Moor 852. 2 Lev. 144. 6 Mod. 141. Lutw. 130, 131. (c) But the sheriff may, if he pleases, take his *posse* to arrest one on mesne process. Noy, 40.

But, if the sheriff takes a man upon an execution, as upon (d) a *capias ad satisfaciend.* and he is rescued from him, before he can bring him to prison, though he returns the rescue, yet this shall not\* excuse him; for when judgment is passed, and he and his bail do not surrender him, nor pay the condemnation-money, and then a *capias* issues, to which there can be no bail, there, it is presumed that he will not be forthcoming, because neither he nor his bail have satisfied the judgment, and therefore the sheriff

Cro. Jac. 410.  
Roll. Rep. 388. 440.  
3 Bull. 193.  
Moor, 852.  
S. C. Proby v. Lumley.  
(d) Or upon a *capias utlagatum* after

ought

judgment. ought to take the *posse comitatus*; and consequently it cannot be a good return, that he took the body, but that it was rescued. The party therefore may have an action of escape against the sheriff on his return. And this is provided by the statute *Westm. 2. (13 Ed. 1. st. 1. cap. 39.)* which was made to prevent sheriffs from returning rescues to the king's writ.

3 Lev. 46. In an action on the case against the sheriff for an escape upon mesne process, the defendant pleaded a rescue, which on demurrer was held a good plea, though he did not shew that the rescue was returned.

Roll. Rep. But, if one taken on mesne process be once in prison, the sheriff cannot return a rescue, for the law presumes that he hath (a) power to keep him there.

441. (a) But if the prison is broken by the king's enemies, this shall excuse the sheriff; 4 Co. 84. 5 Bulst. 198. Cro. Jac. Vent. 239. — but not if broken by rebels and traitors, for the sheriff or gaoler hath his remedy over against them. 4 Co. 84. Cro. Eliz. 815. 2 Mod. 28. Vent. 239.

Hal. Hist. If a felon be attaint, and in carrying him to execution he be rescued from the sheriff, the sheriff is punishable notwithstanding the rescue; for there is judgment given, and the sheriff should have taken sufficient power with him; and therefore in that case the township is not finable.

## 2. Of the Form of the Return, and for what Defects it may be quashed.

3 H. 7. 11. It hath been adjudged, that the return of a rescue by a sheriff must shew the year and day on which it was made, such return being in lieu of an indictment.

Bro. Return de Brief, 97. Fitz. Coro. 45. Attach. 1.

Palm. 532. But it hath been held, that the sheriff's return of a rescue on a *latitat*, without mentioning the day of the caption, was sufficient, all the clerks in court affirming the precedents to have been so.

Moor, 422. The sheriff's return of a rescue, without mentioning the place where it was made, was held naught, and the party discharged.

Yelv. 51. So, where upon a *latitat* awarded against *J. S.*, the sheriff returned a rescue on such a day, but did not mention any place where the rescue was made; it was adjudged a void return, because it doth not appear that either the arrest or rescue were within his jurisdiction. But, if it had appeared to have been done in the county, it should be intended within his bailiwick, though it was within a liberty in the same county; and even in such case, the rescue had been unlawful, because the arrest was good, nobody being prejudiced thereby but the lord of the liberty.

2 Roll. Rep. But, where the return of a rescue recited that a *latitat* was directed to him, &c., and that he made his warrant to his bailiffs, who arrested *A.*, and that he was rescued by *J. S.*, this was held good,

good,

good, though it did not shew the time or place where the rescue was made.

Upon reading the sheriff's return of a rescous, these exceptions were taken to it; 1st, It is said *feci warrantum meum* Thomæ Taylor, and doth not say that *Thomas Taylor* was his bailiff. 2dly, He doth not say for what cause he made his warrant, and so it appears not whether it was lawful or not; and upon these exceptions it was quashed. Stil. 155.

Exception to a sheriff's return of a rescue, that it was not alleged that the party was in custody, it being only by implication that he was rescued out of the bailiff's custody; and for this it was quashed; so that it was not returned who rescued, or that the party rescued himself. Sid. 332.  
Lev. 214.

The sheriff returned a rescous on a special bailiff, viz. that Cook and seven others made an assault on the bailiff, &c. and the party arrested *cepit et abduxit*, when it ought to have been *ceperunt et abduxerunt*; and the court held the return good as to Cook, but void as to the others; and he was admitted to make his fine by (a) attorney, which was 6s. 8d. Lit. Rep. 2.  
(a) An indictment for a rescous returned against one into B. R. ought not to

be quashed, although it be erroneous, except the party that is indicted for it do appear personally in court; for he cannot in such case appear by attorney, because the offence was criminal and personal, for which he must answer in person. 2 Lil. Reg. 468.

A rescue of a person arrested on mesne process was returned against divers particularly named, and the return was that they *rescusserunt*, without saying *et quilibet eorum rescussit*; and held well enough, it being in the affirmative. Vent. 2.  
2 Keb. 436;

Exception taken to the return of a rescue, that it was *feci warrant.*, without saying *sub sigillo officii*, but over-ruled; for it cannot be a warrant unless it be under seal, and the saying *feci warrant. direct.* implies it was so. 2 Jon. 197.

The sheriff returned a rescous thus; 1st, *Non est inventus in ball. mea*, and *executio residui ipsius brevis patet in schedula huic brevi annex.*, and that was of a taking and rescous; and the return of the rescous was quashed for the repugnancy; for *per cur.* after *non est inventus* all the rest is idle, and there remains no more for the sheriff to do. But note; upon the return of a rescous the sheriff always concludes, that after the rescous made the defendant *non est invent. in balliva.* 6 Mod. 220.  
Rex v.  
Weekes.

The return of a rescue was, that the party was in custody of three of the bailiffs, and that the defendants *insultum fecerunt* upon one, which the sheriff called *ballivos meos*; and for that reason it was quashed. 5 Mod. 218.

It hath been a great question, and much debated in variety of cases, whether, upon a rescue of a person out of the custody of a sheriff's bailiff, the sheriff is to return the rescue *secundum veritatem facti*, or *secundum veritatem in lege*, that is, that he was rescued out of the custody of the bailiff, being the truth in fact, or out of his own custody, being the truth in law; the bailiff's custody being in law the custody of the sheriff himself. It seems now agreed, that a return either way is good (b). And herein some books Palm. 532.  
2 Jon. 197.  
Cro. Eliz.  
780.  
Lev. 214.  
2 Lev. 28.  
Raym. 161.  
4 Mod. 293.  
5 Mod. 217.  
Sid. 332.  
Stil. 417.  
[ (b) A return

made by a sheriff that the person arrested was rescued out of the custody of the bailiff has been held to be bad: the return must be, that the person was

books distinguish between a bailiff of a (*a*) liberty and a common bailiff, and say that the return of a rescue out of the custody of a bailiff of a liberty ought to be so expressed, because he is such a publick officer of whom the court takes notice. Others distinguish (*b*) between an action on the case and an indictment for a rescue, for that in the first the plaintiff must declare as the truth is, *viz.* that he was rescued being in the custody of the bailiff, but that in an indictment it must be according to the operation it hath in law.

rescued out of his custody. *Per* Buller, J. 2 Term Rep. 156.] (*a*) 2 Rol. Rep. 263. Stil. 417. Lev. 214. (*b*) Cro. Jac. 242. Raym. 161. 5 Mod. 217.

Salk. 586. pl. 2.

\* If it appear on the return, that the warrant was to two, and the arrest by one only, yet the return is good; for it is no exception in what relates to

But, where the sheriff returned *virtute brevis mihi direct. feci warrant. A. & B. ballivis meis qui virtute inde ceperunt* the defendant, *et in custodia mea habuerunt quousque* such and such *recusserunt* him *ex custodia ballivorum meorum*; this return was on motion quashed. For *per Holt*, Ch. J., when the bailiffs have arrested the party, he is in fact and in truth in their custody, but in law he is in the custody of the sheriff; an answer either way is good, *viz.* that he was rescued out of the bailiff's custody, or that he was rescued out of the sheriff's custody; but to say that he was in the custody of the sheriff, and yet rescued out of the custody of the bailiffs, is repugnant\*.

publick justice. *Rex v. Roe*, 1 Stra. 117. — If on a return of a rescue of two persons, it is only said, they could not afterwards be found, (without saying  *nec eorum aliquis*;) it is ill. *Rex v. Tucker*, 1 Stra. 225. Fort. 362. S. C. — That the bailiff arrested the defendant is good. *Ibid.* — That the defendant being in my custody, is sufficient. *Ibid.*

### 3. Whether the Sheriff's Return of Rescue be traversable.

Cro. Eliz.

781.

Dyer, 212.

2 Jon. 39.

Vent. 224.

2 Vent. 175.

Comb. 295.

Barges, 429.

It seems that anciently, when the sheriff returned a rescue, the party was admitted to plead to it as to an indictment; but the course of late has been not to admit any plea to it, but drive the party to his action against the sheriff in case the return were false. Hence it is now settled, that the return of a rescue is not traversable; but yet it hath been held, that the submission to the fine doth not conclude the party grieved from bringing his action for the false return, if it were so.

## Scandalum Magnatum.

2 Mod. 156.

AT the time of making the law, on which this action is founded, the constitution of this kingdom was martial and given to arms; the very tenures were military, and so were the services; as knights-service, castle-guard and escuage; so that all provocations by vilifying words were revenged by the sword, which



which often created factions in the commonwealth, and endangered even the government itself. For in these kind of quarrels the great men, or peers of the realm, usually engaged their vassals, tenants, and friends; so that laws were then made against wearing liveries or badges, and against riding armed.

The law on which this action is grounded, is the 2 R. 2. [These two statutes are said to have been procured by the Duke of Lancaster, who was extremely unpopular, and at the time of the insurrection among the villains, had been singled out as a principal object of their fury.]  
*stat. 1. c. 5.* which enacts, "That of counterfeits of false news, and horrible lies, of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and other great officers of the realm, it is defended that none contrive or tell any false things of prelates, lords, and of others aforesaid, whereof discord or slander might rise within the realm; and he who doth the same shall incur and have the pain ordained thereof by the statute of *Westminster* the first (3 E. 4. c. 34.) which will, that he be taken and imprisoned, till he have found him of whom the word was moved." And by *stat. 12 R. 2. c. 11.* it is further provided, that "should he not be able to find such person, he shall be punished by the advice of the council, notwithstanding the said statutes."  
 3 Reeve's Hist. 211. 1 Parl. Hist. 360.]

For the better understanding of this Statute we shall consider,

- (A) The Persons who may bring this Action.
- (B) For what Words it lies.
- (C) The Proceedings in this Action.

### (A) The Persons who may bring this Action.

IT hath been held, that the king is not included in the words *great men of the realm*, as the statute begins with an enumeration of persons of an inferior rank, as prelates, dukes, &c. *Crompt. Jur. 19. 35.*

Also it is held, that a woman noble by birth is not entitled to this action. *Crompt. Jur. 34.*

It hath been adjudged, that though there was no viscount at the time of making this statute, (the first viscount being *John Beaumont*, who was created viscount 18 H. 6.) yet, when created noble, though by a new title, he was entitled to his action on this statute. *Cro. Car. 136. Palm. 565. Viscount Say and Seal v. Stephens. Ley, 82.*

Also it hath been adjudged, that since the Union a peer of *Scotland* may have an action on this statute, and that it is not necessary for him to allege that he hath a seat and voice in parliament; for by the 5 Ann. 8. art. 23. all peers of *Scotland* after the Union shall be peers of *Great Britain*, and have rank and precedence, &c. be tried, &c. and enjoy all privileges of peers as fully as the peers of *England* now do or hereafter may enjoy, except  
 Vol. VI. H

\* A Baron of the Exchequer may have this action. Palm. 565. Semb. 12. Co. 134. — It does not lie for a peer if he was not so at the time of speaking the words. Palm. 566.

## (B) For what Words it lies.

2 Mod. 161. Sir Robert Atkins in his Argument. Freem. 222. pl. 229. 2 Mod. 156. **I**T hath been contended for, that no words of slander are punishable by this statute, unless they are actionable at common law, and that they are only aggravated by the statute, which in this respect is like the king's proclamation.

But the contrary hereof seems to have been holden in most of the cases on this head, and not without reason, as it would be to no purpose to make a law, and thereby to give a peer an action for such words as a common person might have before the making of the statute, and for which the peer himself had equally a remedy by the common law; and therefore the design of the statute must be, not only to punish such things as import a great scandal in themselves, or such for which an action lay at the common law, but also such things as favoured of any contempt of the persons of the peers or great men, and brought them into disgrace with the commons, whereby they took occasion of provocation and revenge.

2 Mod. 156. Sir Fran. Pemberton's Argument. — It is said by my Lord

Coke, that, at common law, scandal of a peer might be punished by pillory and loss of ears, and that this offence is now aggravated by the statute. 5 Co. 125. *De libellis famosis*. 12 Co. 37. 9 Co. 56. 2 Mod. 162. — That it was usual to punish offenders of this kind in the Star-Chamber. 2 Mod. 152.

Keilw. 26. 27. 2 Mod. 164. cited. \* The action does not lie for a judicial proceeding, against a peer by action, appeal, indictment, &c. though he be acquitted. 2 Inst. 228. Hob. 266. R. Ket. 26, 27. Dyer, 285. a. The first case on this statute, said to be reported, is in *Keilw.* where the Lord *Beauchamp* brought an action of *scan. mag.* against Sir *Richard Crofts*, for that the said Sir *Richard* had sued out a writ of forgery of false deeds against him; and it was held, that the taking out the writ being done in a legal way, and in a course of justice, the action did not lie \*. 2 Inst. 228. Hob. 266. R. Ket. 26, 27. Dyer, 285. a.

Cromp. Jur. 13. Duke of Buckingham's case. *Scan. mag.* was brought for these words, *You have no more conscience than a dog; so that you have goods, you care not how you come by them*; and held actionable.

— S6 in the same book, You said you would wind my guts about your neck, held actionable. Lord Abergenny's case. Cromp. Jur. 13.

Cromp. Jur. 35. Lord Ch. Just. Dyer's case. So, for saying of a judge, *You are a corrupt judge*.

So, for these words, *J. S. is a covetous and malicious bishop.*

Winton v. Markham; but *vide* Dalf. 38. S. C. *contra*.

Hetl. 55.  
Bishop of

So, for these words, *He imprisoned me till I gave a release.*

3 Leon. 376.  
Lord Win-  
chester's case cited. Freem. 221.

So, these words, *You have writ a letter to me, which I have to shew, which is against the word of God, against the queen's authority, and to the maintenance of superstition, and that I will stand to prove against you,* were held actionable, and 500 marks damages given.

Cro. Eliz. 1.  
Bishop of  
Norwich v.  
Prickett.

So, of these words, *My Lord Mordant did know that Prude robbed Shotbolt, and bid me compound with Shotbolt for the same, and said he would see me satisfied for the same though it cost him 100l. which I did for him, being my master, otherwise the evidence I could have given would have hanged Prude.*

Cro. Eliz.  
67. Lord  
Mordant v.  
Bridges.

*Scan. mag.* was brought for speaking these words, *You like not of me since you like those that maintain sedition against the queen's proceeding; the defendant justified by shewing the occasion of speaking the words, and that the plaintiff encouraging men to preach against the Common Prayer, he only meant that he liked of those who maintained sedition (innuendo seditiosam illam doctrinam) against the queen's proceedings; and this was held a sufficient extenuation of the words.*

4 Co. 14.  
Lord Crom-  
well's case.  
2.

In *scan. mag.* for these words, *My Lord L. is a base earl and paltry lord, and keeps none but rogues and rascals like himself; Williams and Croke, Justices, held, the action lay, for the words touch him in his honour and dignity, and may raise contempt from the people, and that, in case of nobility, general words will maintain an action. But Yelverton and Fleming seemed to incline to the contrary, and said the words touched not his life, loyalty, or dignity, but were only words of spleen; et adjournatur; and after the defendant died, and the writ abated.*

Cro. Jac.  
196. Earl of  
Lincoln v.  
Broughton.

For these words written (a) in a letter, *I have heard that your lordship hath sought by uncharitable means to bereft me of my life, lands, and liberty,* an action lies.

Moor, 142.  
Lord Lum-  
ley v. Fox.  
4 Co. 16.

S. C. (a) That the action as well lies for words written as those spoken. 2 Show. 505. pl. 467.

So, where one, on hearing that his barns were burnt down, said, *I can't imagine who it should be but Lord Sturton.*

Moor, 142.  
Lord Sturton  
v. Chaffin.

It hath been held that for these words, *The Earl of L.'s men by his command took the goods of H. by a forged warrant,* an action of *scan. mag.* does not lie, because not said the earl knew the warrant to be forged. 2.

Goult. 115.

An action of *scan. mag.* was brought for these words, *There are more Jesuits come into England since the Earl of Northampton was Lord of the Cinque-Ports than ever there were before,* and held actionable.

12 Co. Earl  
of North-  
ampton's  
case.

In *scan. mag.* for these words spoken by a parson in the pulpit, *The Lord of Leicester is a wicked and cruel man, and an enemy to the reformation*

Ventr. 60.  
2 Sid. 21.  
Lord Leic-  
ester v. Manly.

*reformation in England, adjudged actionable, and 500*l.* damages given.*

Freem. 49.  
pl. 58.  
Earl of Pem-  
broke v.  
Stanile.

So, for these words, *The Earl of Pembroke is of so little esteem in the country, that no man of reputation bath any esteem for him, and no man will take his word for 2*d.*; and no man of reputation values him more than I do the dirt under my feet*; and held actionable, though said they would not be so in the case of a common person.

Lev. 277.  
Sid. 434.  
2 Keb. 537.  
Earl of Peterborough  
v. Sir John Mordant.

If one says, *I met J. S. whom I do not know, but my Lord P. sent after me to take my purse*, an action of *scandalum magnatum* lies, though not positively said my Lord P. sent him, or that it was to take the purse feloniously; which last, in case of an action by a common person might be a good exception.

Vent. 59. S. C. adjudged, and there said that in these actions the words shall not be taken in *mitiori sensu*.

Sid. 233.  
Keb. 813.  
Lev. 148.  
Marquis of Dorchester  
v. Proby.

So these words, *I value my Lord Marquis of D. no more than I value the dog that lies there*, were without debate adjudged for the plaintiff, but a writ of error was brought, pending which *Proby* was killed, but his executors after paid the money.

Paich.  
27 Car. 2.  
in B. R. Lord Salisbury v.  
Charles Arthur.

So of these words, *My Lord S. may kiss my a —, I care not a t — for him, he keeps none but a company of rogues about him*; on not guilty pleaded, and a trial at bar, the plaintiff had a verdict and 100*l.* damages.

2 Mod. 151,  
8*cc.*  
Mod. 232.  
Freem. 220.  
pl. 227.  
Id. Towns-  
end v. Dr.  
Hughes.

If one says of a peer, *He is an unworthy man, and acts against law and reason*, an action of *scandalum magnatum* lies notwithstanding the words are general and charge him with nothing certain; and so adjudged by *North*, *Wyndham*, and *Scrogs* against the opinion of *Atkyns*, who said the statute extended not to words of so small and trivial a nature, but to such only as were of greater magnitude, by which discord might arise, &c. and therefore the words *horrible lies* were inserted in the statute. *Note*—The rule laid down by the court in this case was, that words should not be construed either in a rigid or mild sense, but according to the genuine and natural meaning, and agreeable to the common understanding of all men.

### (C) The Proceedings in this Action.

2 Mod. 152. **H**ERE I shall take notice of the following particulars:

That it is now clearly agreed, that though there be no express words in the statute which give an action, yet the party injured may maintain one on this principle of law, that when a statute prohibits the doing of a thing, which if done might be prejudicial to another, in such case he may have an action on that very statute for his damages.

1 P. Wms.  
690.

That though the action is to be brought *tam pro domino rege quam pro se ipso*, yet the party is to recover all the damages.

Freem. 49.  
pl. 58.

That if the words are actionable at common law, the peer hath his election to proceed on the statute or at common law.

It

It hath been held, that this being a general law the plaintiff need not recite it particularly, and that if he sets forth so much thereof as shews his case to be within the statute, it is sufficient.

Cro. Car. 136.  
2 Sid. 21.  
Freem. 425.  
pl. 572.

It is now settled, that no new trial is to be granted in *scandalum magnatum* for excessive damages; which point seems to have been determined in the before-mentioned case of Lord *Townsend v. Dr. Hughes*, where the jury gave 4000 l. damages.

2 Mod. 151.  
Mod. 231.

In *scandalum magnatum* the plaintiff declared that the defendant spake these words of him, *My Lord of London is a bold, daring, impudent man for sending heads of divinity to his clergy in these parts contrary to law*, ad damnum 2000 l. which sum the jury gave in damages. *Wallop and Williams* for the defendant moved for a new trial, in regard there was no proportion betwixt the scandal and the damages, and likewise because there was no particular damage proved at the trial; the defendant also had made an affidavit that he was not worth 2000 l. at the time of the action brought, nor since; but notwithstanding the court refused to grant a new trial.

Hil. 33-4.  
Car. 2. in  
C. B. Bishop  
of London  
v. Edmund  
Hickering-  
hill.

It has been ruled, that in *scandalum magnatum* the defendant cannot justify, let the words be ever so true, because the action is brought *qui tam*, in which the king is concerned; but it has been held that the defendant may explain the words by shewing the occasion of speaking of them, and thereby extenuate the meaning of them, as was done in Lord (a) *Cromwell's* case.

2 Mod. 166.  
Freem. 229.  
Poph. 67.

In *scandalum magnatum* the court will never change the venue on the common affidavit that the words were spoken in another county, because a scandal raised on a peer of the realm reflects on him through the whole kingdom, and he is a person of so great notoriety, that there is no necessity of his being tied down to try his cause among his neighbourhood.

(a) 4 Co.  
14. *supra*.  
Carth. 400.  
2 Salk. 668.  
pl. 3.

As in the case of Viscount *Stamford v. Nedham*, where the action was laid in *London*, and the defendant moved to change the venue, for that he was prohibited to stay in *London* having been in arms against the king; but the motion was denied; the plaintiff being a peer of parliament then (b) sitting at *Westminster*, and having election to lay his action where it is most convenient for himself; and there is the less reason for removing it, because the action is as well on behalf of the king as himself.

Lev. 56.  
Keb. 514.

But, in the case of Lord *Shaftesbury v. Graham*, the court in *scandalum magnatum* on a special affidavit of the plaintiff's power and interest in the county where the action was laid, made a rule for changing the venue. But note, that the books which report and cite this case, mention it as a case of the times, and that it was owing to the great influence that lord had in the city of *London*, that the court varied from the general rule, which rule hath ever since, and notwithstanding this case, been adhered to\*.

(b) *Vide*  
1 Sid. 185.  
2 Mod. 256.

court refused to change the venue, after solemn argument, though a rule to shew cause was granted

2 Jon. 198.  
Vent. 103.  
Skin. 40.  
pl. 9.  
2 Show 197.  
pl. 200.  
\* In the case  
of Lord  
Sandwich v.  
Miller, in  
B. R. the

- Cro. Car. 535. It hath been held, that the statute which appoints that actions for words shall be commenced within two years, does not extend to *scandalum magnatum*.
- Cro. Car. 535. Sid. 143. Also it hath been held, that the statute 27 Eliz. c. 8. for bringing a writ of error into the Exchequer-chamber does not extend to this action.
- 3 Mod. 41. It hath been held, that in an action of *scandalum magnatum* special bail is not required.
- 2 Show. 506. It hath been held, that no costs are to be given the plaintiff on his obtaining a verdict.

## Scire Facias.

- (A) The Nature of the Writ.
- (B) In What Cases it is a proper Remedy.
- (C) In what Cases necessary; and herein, who are to be the Parties to it, and of the Privy required; And herein,
1. Of the *Scire Facias* to revive Judgments, and after what Time necessary.
  2. Of the *Scire Facias* on Recognizances and Statutes.
  3. Of the *Scire Facias* on Letters Patent.
  4. *Scire Facias* by and against Executors and Administrators.
  5. By and against Heirs and Tertenants.
  6. By and against Husband and Wife.
  7. *Scire Facias* against Bail.
- (D) The Form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.
- (E) Pleadings to a *Scire Facias*.

### (A) The Nature of the Writ.

Lit. sect. 505.  
Co. Lit. 290. b.  
291. a.  
F.N.B. 267.  
[1 Term Rep. 268.  
2 Will. 251.]

**A** *Scire Facias* is deemed a (a) judicial writ, and founded on some matter of (b) record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside. And though it be a judicial writ, or writ of execution, yet it is so far in (c) nature of an original, that the defendant may plead to it, and it is in that respect considered as an (d) action; and therefore it is held, that a release

lease of all actions, or a release of all executions, is a good bar to a *sci. fa.* 2 Bl. Rep. 1227.

46.] (a) Upon a *fine sur grant et render* of an advowson a *sci. fac.* shall be granted; for this is a judicial and no original. 2 Inst. 470. (b) That in many cases a *sci. fa.* is granted partly upon a record, and partly upon such a suggestion, without which no proceeding could be on the record. 2 Inst. 470. — That the rule holds not always good. That where one comes in by matter of record, he ought not to be ousted without a *sci. fa.*; for he, whose lands are extended upon an *elegit*, upon a recognizance, after the debt be satisfied, may enter without a *sci. fa.*; but the consuee of a statute, because he is to have costs or damages which be not known, cannot be ousted without a *sci. fa.* Cro. Car. 589. 4 Co. 67. 2 Rol. Abr. 497. — *Sci. fa.* lies in Chancery on a patent; for the patent being enrolled is a record of that court; but, where *sci. fa.* is brought for the forfeiture of a patent or other thing in another court, there ought to be an office found in such other court before the *sci. fa.* issues, except the forfeiture appears of record in the same court, whereupon to found the *sci. fa.* 3 Lev. 223. (c) In nature of an original. Skin. 682. Comb. 455. — There are many *sci. fa.* in the register among the original writs. 10 Mod. 259. — [A *scire facias* to repeal letters patent is an original writ. Rex v. Eyre, 1 Str. 43.] (d) Is in nature of a declaration, Sid. 406. — and may be formed according to the subject-matter. Carth. 107.

But, though it be held that a *sci. fa.* is in nature of an original, yet it hath been adjudged, that no writ of error lies into the Exchequer-chamber on a judgment given in *B. R.* on a *sci. fa.* the statute 27 Eliz. cap. 8. which gives the writ of error, mentioning only suits or actions of debt, detinue, covenant, account, actions upon the case, *ejectione firme*, or trespass. Cro. Car. 286. 300. 464. Roll. Rep. 264. Vent. 38. Salk. 263.

Also it was formerly held, that the plaintiff could not in a *sci. fa.* recover costs; but this is now remedied by the statute 8 & 9 W. 3. cap. 11. § 3. Dalt. 95. 3 Bull. 322. [3 Burr. 1791.]

## (B) In what Cases it is a proper Remedy.

**I**F a bill of exceptions be tendered to a judge, and he sign it and die, a *sci. fa.* lies against his executors or administrators to certify it. 2 Inst. 438.

So, if a man be outlawed, who at the time of the outlawry was beyond sea in the king's service, and he bring a writ of error to reverse this outlawry, and obtain a certificate of the marshal of the king's host, (as he ought to do,) in this case, notwithstanding the marshal dies, yet he may assign the same for error, and upon shewing the certificate have a *sci. fa.* to the executors or administrators of the marshal. 2 Inst. 428. vide title Outlawry.

A *sci. fa.* lies against a sheriff who levies money on a *fi. fa.* and retains it in his hands. Hutt. 32. Cro. Jac. 514. And 247. Godb. 276.

So, a *sci. fa.* will lie for a fine assessed on the party at the justice seat of a forest. Cro. Car. 409. — Lies to have execution of damages recovered in an appeal. Cro. Jac. 549.

Upon an *elongavit* returned by the sheriff, a *sci. fa.* lies against the pledges in a replevin, by plaint in the sheriff's court, transmittted to the *hustings*, and so to *B. R.* by *certiorari*. Comb. 1. — That a *sci. fa.* lies against the

sheriff for taking insufficient pledges in replevin. Hutt. 77. \* — \* *Scire facias* in replevin will lie on plaint, or on writ. One may be bail with others for himself; if *elongat.* is returned for the principal, the pledges may be sued; if the writ of inquiry is reducible to a certainty, it is enough; and discontinuance is nothing in this suit, unless it had been void or a nullity. Mulso v. Shere, T. 4 Geo. Fort. 330.

Moor, 247. If one hath judgment in a *quare impedit*, and after, and before execution, the party is outlawed, the king may have a *sci. fa.* Cro. Eliz. 44. 325. (a) Where to execute the judgment, the king having privity enough in this case to sue execution, because the thing (a) as it was in the plaintiff vested in the king. a sufficient privity to maintain a *sci. fa.* Keilw. 168, 169.

Stil. 348. On a motion to discharge an outlawry which was pardoned by the act of oblivion, the court held, that it could not be done on a *sci. fa.* motion, but that the party must bring a *sci. fa.* on the act. to avoid a judgment, made void by the general act of pardon, 12 Car. 2., the court doubted whether this was to be done by *sci. fa.* or *audita querela*. Sid. 231.

5 Mod. 88. Where one obtained judgment, and after had judgment in a *sci. fa.* thereupon, and then became a bankrupt, and the original judgment was assigned by the commissioners to S. S. upon motion it was entered to entitle him to the benefit of the judgment in the *sci. fa.* without bringing a new one.

Cro. Jac. 159. A *sci. fa.* being brought by the successor of a president of the college of physicians in London, upon a judgment in debt obtained by him upon the statute 14 H. 8. cap. 5. against practising physick in London without a licence, he having died before execution; it was objected on demurrer, that the *sci. fa.* ought to have been brought by the executor or administrator of him who recovered; but, without argument, the court held, that the successor might well maintain the action, for the suit is given to the college by a private statute, and the suit is to be brought by the president for the time being; and he having recovered in right of the corporation, the law shall transfer that duty to the successor of him who recovered.

Mich. 7 W. 3. in C. B. Zouch v. Thompson. A *sci. fa.* was brought in the court of C. B. to reverse a fine in ancient demesne, and it was ruled, that no such writ lay, but that the party ought to bring his writ of deceit.

(C) In what Cases necessary; and herein, who are to be Parties to it, and of the Privity required: And herein,

1. Of the *Scire Facias* to revive judgments, and after what Time necessary.

2 Inst. 469. THERE have been different opinions whether a *sci. fa.* lay at common law; but this doubt, says my Lord Coke, arose for want of distinguishing between personal and real actions.

(b) In At (b) common law, if after judgment given, or recognizance acknowledged, the plaintiff sued out no execution within the year, the plaintiff or his consuee was driven to his original upon the judgment, and the *scire facias* in personal actions was given by the statute of (c) *Westm.* 2. 13 Ed. 1. stat. 1. cap. 45.

that no *sci. fa.* lay at common law upon a judgment in a personal action; for the words *five alia quacunque irrotulata*, in the statute of *Westm.* 2. 13 Ed. 1. stat. 1. c. 45. came after *contractus et conventiones*, and therefore could not be construed of judgments, but that the law had been taken to be otherwise, and therefore he must submit. (c) Which see explained, 2 Inst. 469, 470. and that this statute gave the



the *sci. fa.* in personal actions. Co. Lit. b. 290. b. Sid. 351. 3 Co. 12. 4 Mod. 248. 3 Mod. 189. 2 Reeve's Hist. 190.

But in real actions, or upon a fine, though no execution was sued within a year after the judgment given or fine levied, yet after the year a *sci. fa.* lay for the land, &c. (a), because no new original lay upon the judgment or fine.

action one could have no other advantage of his judgment; but in a personal action, debt would lie on the judgment. 7 Mod. 64. 66.

A *sci. fa.* lay as well in mixed as real actions, and upon a judgment in an assise. So, it lay upon a judgment in a writ of annuity.

It hath been adjudged, that if there be judgment in ejectment, and no execution sued thereon in a year and a day, an *habere facias possessionem* cannot be sued out after without a *sci. fa.* And Holt, Ch. J. said, that as to the possession of the land, an ejectment was real, and the only remedy a termor for years had, and that a recovery therein bound the right of inheritance.

But, though after a year and a day there can be no execution of a judgment without a *sci. fa.*, yet, if the plaintiff hath been delayed by a writ of error, he may take out execution within a year and a day after the judgment affirmed.

Palm. 448. and 2 Inst. 471. where it is said, that though it had been otherwise holden, yet experience and later resolutions are so.

And therefore it hath been adjudged, that if a man recovers debt or damages in *B. R.*, and after within the year the defendant brings a writ of error in the Exchequer-chamber, where the first judgment is affirmed after the year expired, yet the recoverer may have execution by *capias* or *fi. fa.* within the year after the affirmance, without a *sci. fa.*, for the affirmance is a new judgment.

So, if after the year after the recovery the defendant brings a writ of error, and the judgment is affirmed, though before the writ of error brought the recoverer was put to his *sci. fa.*, yet this affirmance is a new judgment, and the recoverer may have within the year after the affirmance a *fi. fa.* or *capias* without a *scire facias*.

So, if he be nonsuit in the writ of error, or, if the writ of error be discontinued; for though in these cases there is not any new judgment given, yet the bringing of the writ of error revives the first judgment.

should seem from Rolle's Report, that a *scire facias* is necessary in this case.]

If *A.* recovers against *B.* in *B. R.* damages and costs, and thereupon hath judgment against the bail after a *sci. fa.*, &c. and after *B.* and the bail join in a writ of error upon the statute in the Exchequer-chamber, and after the year and day pass, in this case, notwithstanding this writ of error, the court of *B. R.* may grant execution; for this is a void writ of error, and as if no writ of

error had been brought, and therefore it shall be no continuance of the first judgment; but the year and day being past, the plaintiff cannot have execution without a *sci. fa.*, though the year passed after the writ brought.

6 Mod. 14. 233. If upon a judgment there be a *cesset executio* for a year after the judgment, the plaintiff within the year may take out execution without a *sci. fa.*  
7 Mod. 64. Salk. 600. pl. 9. 2 Ld. Raym. 806.

2 Crompt. 102. [But, if the plaintiff do not take out execution within a year after the *cesset executio* is determined, he must first sue out a *scire facias*.]

3 Lev. 404. Salk. 273. pl. 4. But it hath been held, that where execution hath been taken out after the year and day, it is not void, but voidable only.

Booth v. Booth, Salk. 322. 1 Str. 301. & vide tit. Injunction. But, though it seems agreed, that the execution being staid by the act of the defendant, the plaintiff may after the year and day take out execution without a *sci. fa.*, yet it hath been held, that if the execution is staid by injunction, though by the act of the defendant, yet the court will not take notice thereof, for they do not take notice of Chancery injunctions, as they do of writs of error. [Besides, it might be no breach of the injunction to take out execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error. However, it should seem from a late case, that the staying of the execution by injunction will make no difference, if the court are satisfied that the injunction bill was filed merely for the purpose of delay; for the rule of reviving a judgment by *scire facias*, before execution, was intended to prevent a surprise upon the defendant, and therefore ought not to be taken advantage of by one, who so far from being surprised by the delay, has himself been the cause of it.

Michell v. Cue, 2 Burr. 660.

Hodson v. Earl of War- rington, 3 P. Wms. 36. The plaintiff had recovered judgment in the *Petty-bag*; after which the defendant brought a bill, and had stopped the plaintiff two or three years by an injunction. It was moved, that the plaintiff at law might, under these circumstances, sue out execution without a *scire facias*, and not suffer by the act of the court. *Sed per cur.*—I cannot alter the course of the court, but must take care to preserve it; and it being above a year and a day after the judgment, let the plaintiff sue out his *scire facias*. But the reporter adds, 2. whether in this case the plaintiff *Hodson* could not have taken out execution, and continued it by *vicecomes non misit breve*, agreeably to what was said by the court of B. R. in the above case of *Booth v. Booth*.

Sympton v. Gray, Barnes, 197. Judgment of *Michaelmas* term 1731, signed November 13, *fi. fa.*, bore test November 28, in *Michaelmas* term following. The defendant moved to set aside the *fi. fa.* as irregular, the judgment not being revived by *sci. fa.*, and the *fi. fa.* not being issued within the year. The plaintiff insisted, that the *fi. fa.* being issued within the fourth term from the time of signing judgment, it was regular, and produced an affidavit that execution had been some time staid

staid by an injunction out of Chancery. The court held the injunction to be quite out of the case, and that the year is to be computed from the day of signing the judgment, and therefore set aside the *fi. fa.*

If a *fi. fa.* or *elegit* be sued, and no execution be had thereon, there may be another *fi. fa.* or *elegit* several years after without a *scire facias*, if continuances are entered from the first *fi. fa.* or *elegit*. Welden v. Grey, 1 Sid. 59.

So, if a *fi. fa.* be taken out within the year, and a *nulla bona* returned, and continued down several years, a *capias ad satisfaciendum* may issue without a *scire facias*. But it is otherwise (a), if no execution be returned by the sheriff to warrant the entry of continuances upon the roll. Aires v. Hardrefs, 1 Str. 100. Low v. Peart, Barnes, 210. S. P. in

C. P. (a) Blayer v. Baldwin, 2 Willf. 82. Barnes, 213. S. C.

The defendant obtained a *superfedeas* for want of a declaration, in an action of debt on a judgment, and was afterwards taken in execution by a *capias ad satisfaciendum* issued after a year and a day from the time of the judgment, without any *sci. fa.* to revive. The defendant brought his action for false imprisonment, and the plaintiff justified under the *ca. fa.* The defendant then applied to set aside the *ca. fa.*, and it appearing that a *capias ad respondendum* only, and not a *ca. fa.* had issued within the year, there was nothing to warrant the continuance of a *ca. fa.* on the roll. The rule was therefore made absolute to set aside the *ca. fa.*

A *scire facias* seems to be necessary in order to warrant an execution upon the 31 G. 2. c. 28. § 20. or lords' act.] 1 Term Rep. 80.

If judgment be given in debt, and no execution sued out within the year, yet the plaintiff may after have an award of an *elegit* on the roll of the judgment as of the same term with the judgment, and thence continue it by *vicecomes non misit breve*; so held on a motion to set aside the execution. And though the court said, that an *elegit* ought to be actually taken out within the year, yet, being informed by the clerks of the court, that it had been the practice for many years to make such entry, &c. it was said to be the law of the court, and they ordered the execution to stand. Carth. 283. Seymour v. Greenvil, 2 Show. 235. pl. 233. S. P. Comb. 232. S. P. where it was said by Sir Sam. Astly, that it was not the practice to award an *elegit* on the

roll, because attorneys think they can have no execution after; but it was said by the court to be a mischievous practice. the court to be a

If the demandant or plaintiff take his process of execution within the year, though it be not served within the year, yet, if he continue the same, he may have execution at any time after the year. 2 Inst. 471. Co. Lit. 290. b. & vide 2 Leon. 77, 78. 87.

3 Leon. 259. 4 Leon. 44. Sid. 59. Keb. 159. 6 Mod. 288.

If the plaintiff delay the executing of a writ of inquiry, till a year after the interlocutory judgment, he cannot do it after without a *sci. fa.* Cases in B. R. Pasch. 13 W. 3. Haw v. Cuton.

In the case of the king there need not be any *sci. fa.* after the year and day. 2 Salk. 603.

2 Salk. 598.  
Pl. 3.  
Hardisty v.  
Earny.

If a judgment be above ten years standing, the plaintiff cannot sue a *sci. fa.* without a motion in court; if under ten, but above seven, he cannot have a *sci. fa.* without a motion at side-bar. *Note*—If after such motion, and judgment revived by *sci. fa.*, the defendant dies before execution, the plaintiff must sue a new *sci. fa.*, but may have it without motion, for the judgment was revived before.

Roll. Abr.  
900. Trin.  
23 Car. 1.  
Roberts v.  
Piling.

After a judgment, if the plaintiff within the year sues a *sci. fa.*, he cannot after have a *capias* within the year till he hath a new judgment in the *sci. fa.*

## 2. Of the *Sci. Fa.* on Recognizances and Statutes.

Lit. Rep. 59.

(a) That a  
*capias* lies  
not on a  
*sci. fa.*  
Brown. 33.  
(b) Co. Lit.  
292.  
2 Inst. 469.  
F.N.B. 296.  
Bro. Recog.  
7.

Recognizances and statutes are considered as judgments, being obligations solemnly acknowledged, and entered of record, and the *sci. fa.* on those is the judicial writ, and (a) the proper remedy the conusee hath. But herein we must distinguish (b) between recognizances at common law and statutes merchant, &c.; for upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue execution within the year after the money became payable. But this law is altered by *Westm. 2. 13 Ed. 1. stat. 1. c. 49.* by which the conusee hath a *sci. fa.* given him to revive the judgment and put it in execution, if the conusor cannot stop it by pleading such matters as the law judges sufficient for that end, such as a release, &c. But the conusee of a statute merchant, &c. may at any time sue execution on them without the delay or charge of a *sci. fa.*

2 Inst. 395.  
471.  
Bro. Stat.  
Merch. 16.  
43. 50.

Also, as to recognizances at common law, and statutes and recognizances introduced by statute law, we must further distinguish, that if on the first the conusee dies before execution sued, his executor shall not sue it, even within the year, without bringing a *sci. fa.* against the conusor. The reason is, because the law presumes the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the judgment. And this is to be done by *sci. fa.* brought by the executor, for the alteration of the person altereth the process at common law. But this tending to delay, the *sci. fa.* is taken away in statutes and recognizances by statute law, by the several acts of parliament which introduce them; and therefore upon the death of the conusee of a statute merchant, &c. his executors may come into Chancery, and upon their producing the testament and the statute, shall have execution without a *sci. fa.* as the testator himself might.

4 Inst. 181.  
Roll. Abr.  
eco.  
(c) What  
shall be said  
a breach,  
vide Cro.  
Car. 498.

If a man be bound in a recognizance to the king, upon condition to be of good behaviour, &c. he cannot be indicted for (c) breach of the good behaviour, by which he forfeits his recognizance, without a *sci. fa.*; for if a *sci. fa.* had been brought, he might have pleaded some matter in discharge thereof.

—And how to be assigned, vide 3 Bull. 220. Cro. Jac. 412. Sül. 369.

If a man acknowledge a recognizance to be paid at a day within the year after the date of the recognizance, in this case he may have execution by *fi. fa.* or *elegit* within the year after the day of payment, though the year be past from the date of the recognizance.

31 E. 3. 22.  
b. Roll. Abr.  
899, 900.  
2 Inst. 421.

If *A.* enters into a recognizance or statute, &c. to *B.*, and the sum is made payable at three several days, as 20*l.* at each day, the whole debt being 60*l.*, when the first day of payment is elapsed, the conusee may have execution for 20*l.* immediately, and so for the rest as it becomes due, without waiting for the last day of payment, as he must have done if the debt had been due by bond. And this holds as well on recognizances at common law as upon statutes. And the reason is, because these are in nature of three several judgments.

2 Roll. Abr.  
468.  
Co. Lit. 292.  
2 Inst. 395.  
471.  
5 Co. 81.

If a man recovers an annuity, he shall have execution for every time that occurs after by *fi. fa.* or *elegit* within the year after the time incurred, though the year be past from the judgment, but not after the year without a *sci. fa.*

Roll. Abr.  
900.  
2 Inst. 471.  
Salk. 258.  
pl. 11.  
2 Ld. Raym. 306. 2 Salk. 600. pl. 9.

If two acknowledge a recognizance of 100*l.* *quilibet eorum in solido*, that is, jointly and severally, the conusee may sue several *sci. fa.* against the conusors upon this recognizance.

2 Inst. 395.

So, if *A.*, *B.*, and *C.* bind themselves jointly and severally in a statute, the conusee may have execution against one of them alone, or against all together; but he cannot have execution against two only, for the execution must pursue the statute which is joint or several, but execution against two is neither one nor the other.

2 Roll. Abr.  
468.

By the statute 32 *H. 8. c. 5.* it is enacted, That if lands delivered in execution on just cause be recovered from the tenant by execution before he hath received his whole debt, the conusee (and, by a favourable construction of the statute, his executors) may have a *sci. fa.* out of that court where the execution is first awarded, or out of any court where the record shall be moved by writ of error and affirmed. But this statute is to be construed under these restrictions, that where the conusee hath remedy for part of his debt *in presenti*, or *futuro* for the whole or for part, there, he can have no aid or benefit of this statute.

Co. Lit. 290.  
2 Inst. 678.  
4 Co. 67.

Herein likewise we may consider, that a *sci. fa. ad rebandam terram* lies for avoiding executions on these statutes, which differs from the writ of *audita querela*, for that avoids an execution unjustly obtained at first; but the *sci. fa.* allows the execution just at first, but shews that the end for which it was granted being obtained, it ought of consequence to cease.

2 Roll. Abr.  
480.

And therefore if the conusor, after his land is extended, tenders the money to the conusee, who refuses it, or, if the debt, with all costs and damages, which the statute *de mercatoribus* allows, be satisfied from any casual profit arising from the land, in these cases, the conusor is put to his *sci. fa.*, and cannot enter. But in case of an *elegit* on a recognizance at common law, when the conusee is answered his debt by the perception of the certain

4 Co. 67.  
2 Inst. 398.  
2 Roll. Abr.  
480. 497.

and

and usual profits of the land, the debtor may enter, and is not put to his *sci. fa.* Yet in this case, if the creditor be satisfied by an accidental perquisite, there the debtor cannot enter, but must have a *sci. fa. ad rehabendam terram.* And the reason of these distinctions is, because in the first case the execution issues according to the direction of the statute, not only till the principal debt be levied, but all costs and damages arising by reason thereof; and therefore, since the damages are not ascertained, the record will always oppose an entry, which is but an act in *pais*, and cannot be turned into a defeasance of a matter of record till such damages are settled on record in the *sci. fa.* But in the second case, when the debt is certain, and the value of the land ascertained in the extent, there, when such debt is paid by perception of such settled profits, there is no act on record to oppose an entry, and therefore an entry is lawful. But, where the satisfaction arises from accidental profits which do not appear in the extent, this then is still matter of record in opposition to the entry, since such accidental profits do not appear in the valuation of the land settled by the extent on record.

4 Co. 67.  
2 Rol. Abr.  
497. So, if lands be extended on a statute, and the time of the extent expired, the conusor is put to his *sci. fa.*, because the conusee may have cause to hold the land longer than the time of extent, for he may retain it till he has received his costs of suit and reasonable expences.

2 Rol. Abr.  
482. But no *sci. fa.* lies upon a general averment that the conusee has levied the debt before the time of the extent expired, because this may happen by the conusee's industry in improving the land, which the debtor can take no advantage of. So, if the land taken in execution be really worth 20 *l. per ann.*, but it is extended only at 10 *l.*, though by this computation it is evident the conusee might levy the debt before the time of the extent is ended, yet the conusor, upon an averment that the debt is levied, shall have no *sci. fa.*, because that would be contrary to the record, and the court is to judge of the value according to the extent; by which it appears that the debt is not levied. But, if the conusee has levied part by cutting wood, and has received the residue, as appears by an acquittance, in this case he shall have a *sci. fa.* The reason is, because the end of the extent being only to satisfy the conusee his reasonable demands, whenever it appears to the court that they are answered, whether it be by the perception of the profits or otherwise, they grant a *sci. fa.* to avoid the extent.

2 Rol. Abr.  
482. If the conusee has levied part of the debt according to the extent, the conusor, upon tender of the residue in court, shall have a *sci. fa.* to recover the lands within the time of the extent; for here it appears on record how much was due at first, how much was paid, and what remains due and in arrear. But, if the conusor had tendered the remainder of the debt out of court, or, if in court he had only offered to come to an agreement with the conusee, in neither of these cases shall the *sci. fa.* be granted, because it does not appear on record that the debt is paid.

The grantee of a reversion may bring a *sci. fa.* against him who hath execution of the lands on a statute-merchant, on alleging that he hath satisfaction by some casual profits, though he was not party or privy. Dyer, 1. pl. 6.

[*Scire facias* in the Petty-bag will lie on a bond given to the late king, his executors and administrators, as within 32 H. 8. c. 39.] Rex v. Bradford, 2. Ld. Raym. 1327.

## 3. Of the *Scire Facias* on Letters Patent.

The writ of *sci. fa.* to repeal letters patent lieth in three cases: 4 Inst. 88.  
1st, When the king by his letters patent doth grant by several letters patent one and the self same thing to several persons, the first patentee shall have a *sci. fa.* to repeal the second: 2dly, When the king doth grant a thing upon a false suggestion, he *prærogativâ regis* may by *sci. fa.* repeal his own grant: 3dly, When the king doth grant any thing which by law he cannot grant, he *jure regis*, and for the advancement of justice and right, may have a *sci. fa.* to repeal his own letters patent; and the judgment in all these cases is, *Quod prædictæ literæ patentes dicti domini regis revocentur, cancellentur, evacuentur, annullentur, et vacuæ et invalidæ pro nullo penitus habeantur et teneantur, ac etiam quod irrotulamentum eorundem cancelletur, cassetur et adnihilentur.*

Where a patent is granted to the prejudice of the subject, the king of right is to permit him upon his petition to use his name for the repeal of it in *sci. fa.* at the king's suit; and to prevent multiplicity of actions: for such actions will lie notwithstanding such void patent: as, where the king grants a patent for holding a fair or a market without a writ of *ad quod damnum*, or where such writ hath been deceitfully executed, in such case a *sci. fa.* lies to repeal the patent. 2 Vent. 314. The King v. Sir Oliver Butler. 3 Lev. 220, 221. S. C. 6 Mod. 229. S. P.

And though in the above case it was urged that a *sci. fa.* did not lie to repeal such patents, because there is (a) another remedy by the common law, i. e. by assise of nuisance, *quod permittat*, &c. where the matter shall be tried by a jury and several judges, and not by one judge only, as it is in (b) Chancery; yet it was resolved, that the king has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *sci. fa.* 3 Lev. 221. (a) For this vide Dyer 197. 11 Co. 74. 8 Co. Prince's case. (b) It is the highest point of the Lord

Chancery's jurisdiction to cancel the king's letters patent under the great seal. 4 Inst. 88. vide title Jurisdiction of the Court of Chancery. [This proceeding in a *scire facias* to repeal letters patent is in a particular manner derived from the great seal; for the very end of the suit is, and so is the judgment, that they be recalled into the same place whence they went forth under the great seal, that they may be cancelled, that is, that the great seal may be taken off. In the case of the *Mayer and Burgesss of Liverpool against the Chancellor of the County Palatine of Lancaster*, in B. R. Trin. 12. Ann. there was a *scire facias* to repeal a charter granted to that corporation under the great seal of the county palatine. To this suit a prohibition was moved for, for want of jurisdiction in the court. But it was resolved, that that court had jurisdiction of the cause, and, amongst other reasons which were given for that judgment, it was declared, that this authority was incident to the seal of the county palatine: that the complaint of the writ being, that the Chancellor had wrongfully put the seal to it, it was proper to be examined in that court where the seal was kept. See Mr. Yorke's argument in 1 Str. 151.]

It was likewise objected in the above case, that there ought to have been an office found before the *sci. fa.* issued, for that a *sci. fa.* 3 Lev. 223.

is a judicial writ, and ought to be founded on a record; to which it was answered and resolved, that true it is, a *sci. fa.* ought to be founded on a record; and so it is here, for the patent is a record in Chancery upon which this *sci. fa.* issued, and it is a sufficient record whereon to found it. But, where the *sci. fa.* is brought for the forfeiture of a patent or other thing in another court, there ought to be found an office in such other court before the *sci. fa.* issues, except the forfeiture appears of record in the same court whereupon to found the *sci. fa.* And where the office is found, the king shall seize (a) presently upon the office found: but, where the office is founded upon the office itself, as here, the king cannot seize until the forfeiture, or other defect of the patent be tried upon the *sci. fa.*

(a) 9 Co. 96.

#### 4. *Scire Facias* by and against Executors and Administrators.

One that is no party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and it be within the year, shall have no writ of execution, but a *sci. fa.* to enable themselves to the suit. And so of the tenant or defendant, for the alteration of the person altereth the process. Otherwise, in the case of a statute staple or merchant, because the process is given by other acts of parliament.

But, if there be two plaintiffs in a personal action, and one of them die, that shall not put the other to a *sci. fa.* So, (b) if one of the defendants die, because the same party still remains on record.

7 Mod. 68. per Holt, who said that it had been so lately adjudged; for this *vide* Moor, 367. pl. 503. Noy, 150. Carter, 112. 122. 180. 193. (b) 5 Mod. 339. S. P. Resolved, if a suggestion of his death be made on the record, but not otherwise, because then it would not be agreeable to the record. Salk. 319. pl. 3. Ld. Raym. 244. Comb. 441. 5 Mod. 38. Carth. 404. 6 Mod. 108. *et vide* stat. 8 & 9 W. 3. c. 11. f. 7. [Vol. I. 15.]

Mod. 188. So, if there be judgment against A., and thereupon a *fi. fa.* be sued out, but before execution A. die intestate, there needs no *sci. fa.* to renew this judgment, but execution of the goods may be made in the hands of the administrator; for, as the party himself could not have made any defence to the writ of execution, there is no reason that his representative should be in a better condition.

It was formerly held, that if an administrator, having obtained judgment against a creditor of the intestate's, died, the administrator *de bonis non* could not have a *sci. fa.* on this judgment for want of privity, but must begin anew.

Cro. Jac. 4. Yale v. Gough, adjudged by three judges against one. Yelv. 33. S. C. But for this *vide* Cro. Car. 167. Latch, 40. Palm. 443. 5 Co. 9. And. 23. Moore, 40. 2 Saund. 149. Sid. 29. 2 Sid. 122.

But now by the 17 Car. 2. cap. 8. it is enacted, "That where any (c) judgment after verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *sci. fa.* and take execution upon such judgment."

(c) It must appear that it was after verdict, for a judgment by default is not within the equity of this statute. Salk. 322. pl. 10. 2 Ld. Raym. 1072. 6 Mod. 290. 11 Mod. 34. pl. 6. If an administrator obtains a decree, but dies before enrolment, the administrator *de bonis non* may revive this decree within the equity of this statute. 2 Vera. 237.



If an administrator *durante minoritate* brings an action and recovers, and then his time determines, the executor may have a *sci. fa.* upon that judgment.

2 Brownl. 83. Godb. 104. Lev. 181. Keb. 750.

So, if such an administrator obtains judgment, he may bring a *sci. fa.* against the bail, and they cannot object that the infant is of full age, for the recognizance being to the administrator himself by name, though he be administrator *durante minori etate tantum*, yet he may have a *sci. fa.* against the bail.

[An administrator *durante minoritate* obtained a decree to account: the infant married, and a new administration during her minority was granted to her husband. It was objected, that such an administrator cannot at law take execution on a judgment obtained by the former administrator. But it was ordered, that the defendant should answer, and that matter be saved to him at the hearing of the cause.]

A judgment on a warrant of attorney entered in the vacation against a defendant who died in the preceding term is good, and execution tested on a day *prior* to the death of the defendant may be sued out upon it. *Secus*, where it is tested on a day *posterior* to the defendant's death, for in that case the judgment must be revived against his representative by *scire facias*.]

See the cases of Heapy v. Parris, 6 Term. Rep. 368. Walker v. Drawater, Anstr. 680. Bragner v. Langmead, 7 Term Rep. 20.

### 5. By and against Heirs and Tertenants.

It is clearly agreed, that in all real actions a *sci. fa.* lay at the common law, and, consequently, that an heir may by such writ revive and enforce the execution of a judgment obtained by his ancestor.

Ld. Raym. 806. Salk. 258. pl. 11. 7 Mod. 50. 64. 2 Inst. 469. 3 Co. 12. 2 Salk. 600. pl. 9. 4 Mod. 248.

Also it is held, that if the demandant in a writ of coufenance, or other (a) real action, in which land and damages are recovered, has judgment, and dies, the heir shall take out execution as to the land, and the executor as to the damages.

in waste, the heir shall have execution of the land, and the executor of damages. 43 E. 3. 2. 1 Roll. Abr. 889.

And as a *sci. fa.* lies for the heir, so it lies against (b) him on a judgment obtained against his ancestor. But this is to be understood where lands in fee-simple descend to the heir, for it would be unreasonable to subject the heir to the payment of his ancestor's debts any further than the value of the assets descended. Also, if the heir be within age, he is not liable to execution during his minority, but in such case the parol must demur.

And though an heir only, who hath lands in fee-simple descended, is bound, yet, if A. be tenant for life, remainder to B. his son in tail, and A. enter into a recognizance and die, C. bring a *sci. fa.* and B. be returned heir and tertenant, and warned, but make default, he can have no *audita querela* to avoid this execution, because he had a day given in court to set aside the recognizance, and it was his folly not to appear when warned.

19 E. 4. 5 b. 43 E. 3. 2. Roll. Abr. 889. (a) So, of a recovery. (b) Against the heir of an heir. Cro. Jac. 186. Dyer, 81. Co. Lit. 105. 290.

Sid. 54. Raym. 19.

Vern. 143.  
2 Vern. 37.  
88, 89.  
3 Lev. 355.

If there be a sequestration for a personal duty against the ancestor where the heir is not bound, and the defendant die, there is an end of the sequestration; and it cannot be revived against the heir, because neither the heir nor the lands are bound by such decree. But, if the decree was upon a covenant that bound the heir, and the defendant died, such decree might be revived by *subpœna sci. fa.* against the heir, to shew cause against the decree, if the decree be enrolled of record, or if not, by bill of revivor; and when revived against the heir and executor, (which is the usual and regular way,) the sequestration also will be revived on motion, if, upon coming into court, cause is not shewn why the decree should not be revived.

[1 Vez.  
184-5.]

Carth. 107.

Where a judgment is had against one who dies before execution, a *sci. fa.* will not lie against his heir and tenants until a *nihil* is returned against his executor.

And. 161.

(a) On a  
motion to  
reverse an

It is laid down as a general rule, that in all cases where the (a) inheritance or freehold is affected, the tenant of the freehold is to be made a party.

outlawry in treason it was objected, that there ought to be a *sci. fa.* to the Lords mediate and immediate before the outlawry shall be reversed; but held not to be necessary, the forfeitures in treason belonging to the king, and not to them. 4 Mod. 366.

Salk. 339.

pl. 4.  
2 Salk. 598.  
pl. 2.

Comb. 318.

Dyer, 321.

Co. Ent. 233.

Cro. Eliz. 474. 739. Bridgm. 69. Moor, 524.

Hence it hath become a settled point, not to reverse a fine without a *sci. fa.* returned against the tenants; for the conusees are but nominal persons, and the tenants ought not to be put out of possession without warning to defend themselves, for they may have a release to plead, or some other defence to make.

Carth. 111.

3 Mod. 119.

Skin. 273.

pl. 1. Earl

of Pem-

broke's case.

So, upon a writ of error to reverse a common recovery, it was said by Holt Ch. J. that though the granting a *sci. fa.* in such cases against the tenants is discretionary, and not *stricti juris*, yet, that it being the constant course of the court to grant it, he was of opinion not to depart from that which had been the usual course of the court, and therefore awarded a *sci. fa.* though the case was of a hard nature, and attended with extraordinary circumstances.

27 H. 6.

135.

1 E. 2. 242.

3 Co. 13. a.

Cro. Car.

275, 313.

(b) A *sci.*

*fa.* may be

against the

heir and

tenants,

and the heir

cannot ob-

ject, that a

*sci. fa.* ought

first to issue

Regularly, the *sci. fa.* is to be awarded to the (b) heir and tenants; and it seems to be the better opinion, that the tenant alone is not to be charged, and that therefore until the heir be summoned, or that it be returned, that there is not any heir to be summoned, or that the heir hath not any lands to be charged, the tenant ought not to be charged, for the heir may have a release to plead, or other matter to bar the execution; and his land is rather to be charged than the land of the tenant, for the heir shall not have contribution against the tenant, as the tenant shall have. Also, if the heir be within age, the parol shall demur, and the tenant shall have advantage thereof.

Cro. Eliz. 896. Sir Christopher Heyden's case.

All the tertenants are to be summoned, and therefore in a *sci. fa.* against some of them they may (a) plead, that there are other (b) tertenants not named, and pray judgment if they ought to answer *quousque* the others are summoned.

Salk. 40.  
Pl. 9.  
2 Salk. 679.  
Pl. 7. 601s  
Pl. 11. S. C.  
6 Mod. 134.

199. 226. S. C. (a) But, when a tertenant is summoned, and he doth not plead, that there are other tertenants not summoned, he shall never afterwards have a *sci. fa.* or *audita querela* to compel the others to contribute. Moor 524. (b) Where plea, that another was jointly seised with him, *vide* Rol. Rep. 57. 2 Jon. 122. Comb. 185.

But it hath been doubted, whether such tertenants could plead other tertenants not warned in another county, which it is now held they may; and accordingly it hath been determined, that when one tertenant is returned summoned upon a *sci. fa.* he may plead that there are other tertenants though in another county, and that this is not within the statute 16 & 17 Car. 2. cap. 5. which relates to an extent executed.

2 Vent. 104.  
Prynne v.  
Slaughter.

Upon a judgment in debt a *sci. fa.* issued against the tertenants, and A. was returned tenant, who pleaded that J. S. was seised of 20 acres of land, which were the defendant's at the time of the judgment given, and prayed judgment if he should be put to answer until J. S. was warned. On demurrer, this was held a good plea: but it was said that the writ should not abate, but that the defendant should not answer till the other was warned. And it was said by *Houghton* Justice, that there was a diversity between a *sci. fa.* to have execution on a judgment in debt, and to have execution on a judgment in a real action; for in the last case, it is no plea, for every tenant shall answer for himself, and one may lose, and the other not; but in the first case each ought to be contributory for his part.

Cro. Jac.  
506.  
Mitchell v.  
Sir John  
Crofts.

If there be judgment in debt against two, and one die, a *sci. fa.* lies against the other alone, reciting the death; and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment if he ought to be charged alone; for at (c) common law the charge upon a judgment being (d) personal, survived; and the statute *Westm. 2. (13 Ed. 1. st. 1.)* that gives the *elegit* does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases, for the words of the statute are *fit in electione*. But if he should, after the allowance of this writ, and revival of judgment, take out an *elegit* to charge the land, the party may have remedy by (e) suggestion, or by *audita querela*.

Lev. 30.  
Raym. 26.  
Keb. 92.  
Edsar v.  
Smart.  
(c) 1 E. 3.  
13. pl. 41.  
3 E. 3. pl. 37.  
29 Aff. pl.  
37.  
29 E. 3. 29.  
(d) For the  
difference  
between a  
real and a  
personal ex-  
ecution, an 1

that a personal execution will survive, though a real one will not, *vide* 3 Co. 14. Raym. 153. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 3. Holt, 1. pl. 2. Carth. 236. Ld. Raym. 244. Comb. 441. 5 Mod. 338. Carth. 404. Show. 402. *vide* F. N. B. 166. 44 E. 3. 10.

Yelv. 209.  
Holt, 1. pl. 2.  
(e) For this

The *sci. fa.* may either be (f) general against all tertenants, or against the tertenants naming them: but it is (g) said, that if a person undertakes to name them, he must be sure to name them all. (f) Whether to be directed to all the executors generally, or to them by their names. (g) Comb. 282.

2 Salk. 600.  
pl. 8.  
Ld. Raym.  
669.  
2 Bulf. 231.

2 Salk. 598.  
pl. 1.

To a *sci. fa.* against the heir and tenants, the sheriff must return that they are tenants of all the lands *in ballivâ suâ*, and not that they are tenants of lands *in ballivâ suâ*.

### 6. By and against Husband and Wife.

Cro. Car.  
207. 227.  
Beaumont v.  
Long, ad-  
judged;  
though ob-  
jected the  
judgment  
was for the  
costs and da-  
mages which

If a woman, executrix to *J. S.* marries, and the husband and wife bring an action of debt upon an obligation in the right of the wife as executrix to *J. S.* against *J. D.* and have judgment against him to recover the debt with damages and costs, and after the wife dies before execution sued, the husband shall not have a *sci. fa.* upon this judgment; for that he, though he was privy to the judgment, shall not have the thing recovered, but it belongs to the succeeding executor or administrator.

belonged to the husband, though the debt did not, and therefore the *sci. fa.* should be maintained for the damages; but a *sci. fa.* being as well for the debt as damages, it was held not maintainable; and whether he might maintain a *sci. fa.* for the damages and costs, they would give no opinion. Jon. 248. S. C. adjudged, and said, this recovery does not turn it to the proper debt of the husband, as it would, if the baron and feme recovered the proper debt of the feme.

Sid. 337.  
Cro. Eliz.  
844.  
3 Mod. 188.  
2 Leon. 14.  
4 Leon. 186.

But, if husband and wife obtain judgment in debt, and the wife dies, the husband, without taking out administration to her, may have a *sci. fa.* for by the judgment it is become a debt to him.

Salk. 116.  
pl. 7.  
Woodyer v.  
Gresham,  
adjudged.  
Comb. 455.  
S. C. by  
which it ap-  
pears the  
year expired  
before the *sci. fa.* taken out, and said by Holt, Ch. J. that the debt was attached to him jointly with his wife: so that although the award of the execution did not alter the nature of the debt, yet it altered the property. Carth. 475. Skin. 682. pl. 2. S. C.

If a woman obtains a judgment in debt and after marries, and the husband and wife sue out a *sci. fa.* and thereupon have an award of execution, though the wife dies, yet the husband (without taking out administration) may have execution upon the judgment, for the award upon the *sci. fa.* attached in the husband, and shall survive, though objected, the award on the *sci. fa.* made no alteration, because the execution must be on the first judgment.

Carth. 30.  
Salk. 116.  
pl. 7.  
3 Mod. 186.  
Comb. 103.  
Skin. 682.  
pl. 2.  
Obrien v. Ram.

If a judgment in debt is obtained against a feme sole, who afterwards marries, and then a *sci. fa.* is thereupon brought against husband and wife, and after two *nibils* returned, judgment is given that the plaintiff shall have judgment against them, and the wife dies, the husband shall be liable to this execution.

Wortley v.  
Rayner,  
Dougl. 637.

[On a plea of coverture in an action of debt on a judgment, a verdict was found for the defendant, and a writ of *fiere facias* sued out for the costs, commanding the sheriff to levy and pay them to the defendant, and her husband. A rule was granted to shew cause, why the writ, and proceedings thereon, should not be set aside for irregularity, it being a maxim, that a person, not a party to the record, cannot be benefited, or charged by the process, without a *fiere facias*. The court were clearly of opinion, that the proceedings were irregular. And *Albhurst*, J. added, the wife

might

might have had process in her own name, because, the plaintiff having declared against her as sole, he was concluded from denying it.]

7. *Scire Facias* against Bail.

A *sci. fa.* is the usual and proper remedy against the bail when judgment hath been obtained against the principal, and no satisfaction made by him. This is founded on a record, to wit, the act of the court in admitting the party to bail, and the judgment against him. But it must appear that the party himself hath not satisfied the judgment; and hence it hath become a settled rule that there must be (a) a *capias* returned against the principal before the *sci. fa.* is to issue against the bail \*.

Moor, 432.  
Cro. Eliz.  
597.  
Lev. 225.  
& vide title  
Bail, letter  
(D).  
(a) That it  
must be a-  
warded  
within the

year, else not till a *sci. fa.* against the principal. 2 Jon. 96.—Not necessary to recite it in the *sci. fa.* Cro. Jac. 97. \* And the course is, to get the sheriff to return *non est inventus* on the *ca. fa.*

If there is judgment against *A.* to account, and manucaptors found by him to appear before auditors assigned, no *sci. fa.* lies against the manucaptors or bail without a certificate from the auditors to the court, that he hath not conformed; for the auditors are judges of the cause, and may excuse the non-appearance, and may appoint a shorter or longer day for the party to appear, as they think fit. Stil. 105.

In a *sci. fa.* against bail, they cannot plead, that the principal died before the *sci. fa.* issued (b), but they may plead, that the principal died (c) before the return of the *capias* against him: so, they may plead, that the principal died before any judgment against him, because they cannot have a writ of error to reverse that judgment. Cro. Jac. 163. Hutt. 47. (b) Cro. Jac. 97. Moor, 175. Popl. 186. Winch. 61.

Stil. 324. 2 Mod. 28. 308. (c) But, if he dies after the return of the *capias*, this will not excuse the bail. Roll. Abr. 336. [Glyn v. Yates, 1 Str. 511. 8 Mod. 31. S. C. Barry v. Barry, 2 Str. 717. 2 Ld. Raym. 1452. S. C. Filewood v. Popplewell, 2 Wils. 67. S. P.]

If the principal surrenders himself, or the bail render him up, this will discharge the bail, and may be pleaded to the *sci. fa.* but such surrender or render are not sufficient, unless the plaintiff or his attorney have notice of it. And this is required, that the plaintiff may, if he pleases, charge him in execution; also, that he may not be at any further trouble or charge in proceeding against the bail. Moor, 888. Leon. 58. 2 Bulf. 260.

In a *sci. fa.* by the executor of the plaintiff, upon a judgment against the principal, the defendant pleaded that the testator sued execution by *sci. fa.* against the bail, and had judgment and execution awarded against them: it was held no plea, because not shewed the plaintiff was satisfied by the execution against the bail; for otherwise, without satisfaction, he may always charge the bail. Cro. Jac. 545. Freeman v. Freeman.

If one be bail for *A. B. C.* and *D.* and before the return of the second *sci. fa.* the plaintiff take *A.* in execution, yet the bail are not discharged as to the other three, for they undertook to bring in all four. 1 Lev. 195. Vent. 315. 2 Mod. 312. 2 Jon. 75. Astly v. Ballard.

Barlow v.  
Evans,  
2 Will. 98.

[*Scire facias* against bail in error, on a judgment for damages, must be to shew cause, why plaintiff should not have execution of the *debt* aforesaid (the specifick sum in the recognizance) not of the damages.

Simmonds  
v. Middle-  
ton, 1 Will.  
269.

If a *capias ad satisfaciendum* against the principal is left with the sheriff before the allowance of a writ of error, and appears afterwards to be returned *non est inventus*, it shall be presumed to be returned after the writ of error spent, and it is sufficient to found a *scire facias* against the bail.

2 Mod. Ca.  
305.

If the *scire facias* against the principal after judgment has only four days between the *teste* and return, and a *scire facias* is brought against the bail, proceedings shall be stayed, upon motion by the bail.

Myer v.  
Arthur,  
1 Str. 419.

Where after error brought by the principal, a *scire facias* was sued out against the bail, the court ordered the proceedings to be stopped, on the bail consenting, if the judgment were affirmed, to surrender the principal, or give judgment on the *sci. fa.*

Capron v.  
Archer,  
1 Burr. 340.

Where the writ of error by the principal was allowed before the time was expired within which the bail had indulgence to surrender the principal, though notice of such allowance was not given to the plaintiff's attorney until after the expiration of that time; the court of *B. R.* gave the bail the same terms as are usual where they apply within the time indulged to them for surrendering the principal.

Everett v.  
Gery,  
1 Str. 443.  
Richardson  
v. Jelly,  
2 Str. 1270.  
So, in Ald-  
ridge v.  
Snowden,  
8 Mod. 130.  
the bail did  
not move till  
both *sci. fa.*  
were out  
and the rules  
upon them,  
and the court  
held they  
came too  
late.

On the return of the second *scire facias* against bail, a four day rule was given, and on the fourth day the principal brought error, whereupon it was moved to stay proceedings against the bail pending the writ of error; and the above case of *Myer v. Arthur*, and *Church v. Throgmorton* in the House of Lords, were cited; in which last case, the House threatened to commit the attorney for proceeding against the bail pending error in parliament. As to the first case, the court said, it differed, for there, the bail came in time, while they might surrender the principal; which they cannot do here, after the return of the second *scire facias*, at which time no writ of error was brought. And as to the case in the House of Lords, it was there agreed, that the court below could not restrain them; but the Lords said they expected more respect. We can make no rule.

Cole v.  
Buckland,  
2 Str. 872.

The second *scire facias* was returnable the first day of the term, and a week within term the bail moved to stay the proceedings on the common terms of giving judgment in the *scire facias*, and taking four days to surrender after affirmance in the principal cause. But the court held they came too late, after their time to surrender was gone, and would not revive it again: all they would do was to stay the suing out of execution until after affirmance.

Hunt v.  
Coxe,  
3 Burr.  
2300.

It is immaterial whether the *ca. fa.* be actually returned, or such return actually filed, before the issuing of the *scire facias* against the bail; for if the bail should plead that no *ca. fa.* was returned and filed before the *teste* of the *scire facias*, such return may be filed at any time before putting in a replication to the plea.

If the first *scire facias* bears *teste* the same day with the *ca. fa.*, and the bail have rendered the principal after judgment, both writs of *scire facias* will be quashed. Wilcox v. Proffer, Barnes, 95.

The court have refused to set aside a judgment actually signed against the bail, because error was pending by the principal.] Fisher v. Emerton, 1 Str. 526. Humphreys v. Daniel, Barnes, 203. S. P. But Taswell v. Stone, 4 Burr. 245†. and Benwell v. Black, 3 Term Rep. 636. *contra*.

## (D) The Form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.

IT is said that a *sci. fa.* being a judicial writ, shall not abate for want of (a) form; and that therefore where the words (b) *si sibi viderit expedire* were left out in a *sci. fa.* yet the writ was held sufficient. Lucas, 270. (a) *Sci. facias* for *scire facias* held naught. Sid. 406. (b) 3 Keb. 190. *cont.* 2 Lutw. 1281.

Also it hath been agreed, that wherever an original was amendable, there, a *sci. fa.* would be so too, and that a discontinuance herein by the demise of the king is aided by the statute 1 Ann. cap. 8. 6 Mod. 263. 10 Mod. 258. 354. [That is, where a *scire facias* 1 Str. 43.]

is an original writ, as, where it is to repeal letters patent.

If the bail sues an *audita querela*, and a *sci. fa.* thereupon, which recites the *audita querela* and the *capias* against the principal, and the return thereupon, which *capias* was awarded *tempore regine Eliz.* and the *sci. fa.* is recited to be *per breve domine regine Anglie vicecomiti nostro de S. direct.* which is to the sheriff of the king that now is, this is error by the common law, but is (c) now amendable. Roll. Abr. 199. 797. Barnes v. Woolrich. (c) By the 13 Eliz. c. 14. no judgment to be stated or reversed

after verdict for want of form in any judicial writ; for which *vide* Cro. Jac. 89. 162. 372. 12. Vent. 105. [That a *scire facias* is not amendable, but the proper way is for the plaintiff to move to quash it. See Hillier v. Frost, 1 Str. 401. Grey v. Jefferson, 2 Str. 1. 65.] 2 Sid. 7.

But, where in ejectment, there was judgment for two messuages, and after a year a *sci. fa.* upon it recited a judgment of one messuage only; and *nul tiel record* being pleaded, it was moved to amend it, it was denied; for the court held, that the writ was good, for aught appeared on the face of it, and that if there were a judgment for one messuage, this would be a good writ to revive it; so being good in itself, though not apposite to this purpose, to amend would be to make a new writ, or to alter a good writ, and fit it to another purpose; and to amend this writ would falsify the defendant's plea, which was good at the time when pleaded. But, if the fault had appeared in the very writ, it might be amended. And for his expedition the plaintiff took another writ, which the court held he might do without getting this quashed; for if this writ abates, then it is not the same cause. 6 Mod. 263. 310. Williams v. Hoskins.

So, in a *sci. fa.* on a judgment, where by mistake in the *sci. fa.* the plaintiff's name was put for the defendant's, *Sir Rhadulphus* for Salk. 52. pl. 17. Vavasor v. Baile,

for *Jacobus*; it was moved to amend it, being the fault of the clerk, but denied *per cur.* for the writ does not appear to us to be wrong, and there may be such a judgment for aught we know.

Latch. 112. It is said that a *sci. fa.* is in nature of a bill in Chancery, and that the same certainty is not required therein as by the common law.

Hill. 15 &  
26 Car. 2.  
in B. R.  
Dually v.  
Lord Byron.  
Sid. 173.  
Keb. 648.  
S. C.

In a *sci. fa.* upon a judgment in the upper bench before *Oliver* Lord Protector of the Commonwealth of *England, Scotland* and *Ireland*, and the dominions thereunto belonging, &c. the *sci. fa.* was *coram Olivero domino nuper protectore* only; *nul tiel record* was pleaded; and if this was a variance between the *sci. fa.* and the record, was the question. *Twifden* held it variant, in that there might have been another judgment *coram domino protectore* only; and said, the act for confirmation of judicial proceedings confirms them, and makes them records only under that stile. But the other judges held, that this was no material variance; and that in a *sci. fa.* it was not necessary to set forth the stile of the king at large.

2 Inst. 470. By the statute *Westm. 2. 13 Ed. 1. stat. 1. cap. 45.* there shall be no esoin nor protection in a *sci. fa.* but aid, age and receipt shall be granted; for the words *solemnitates curiæ* are to be understood the solemn judicial proceedings of the court, but extend not to the right of the party to have his age, or to be received, or to have aid of another.

Merfoot v. Chivers,  
1 Str. 631.

[In a *sci. fa.* on a judgment recovered by an executor, it is not necessary to state the death of the testator.]

6 Mod. 68.  
Jevon v.  
Turner.

A *sci. fa.* to revive a judgment against an executor, mentioned first a day of appearance *coram nobis ubicunque*, but after gave a day to the party to appear *ad præd. diem apud Westm.* and it was moved to amend it; but the court said, that it being in the writ they could not do it of grace or favour, but would give day to shew cause why it should not be amended *ex merito justitiæ*; but the plaintiff for his expedition moved to quash it.

Manning v. Bois,  
3 Salk. 320.  
Where it was objected to a writ of *sci. facias* grounded upon a judgment in an assise, which is an original, that it ought to have been returnable *ubicunque*, whereas it was returnable on a day certain, Holt, C.J. said, it is good one way or the other. *West v. Sutton*, 2 Ld. Raym. 853-4.

[After a writ of error brought on a judgment in *C. B.* there was a *scire facias* tested 28 November, returnable *die Veneris proximo post octab. Sancti Hilarii ubicunque tunc fuerimus in Angliâ*, to shew cause *quare executionem non haberet*, to which the defendant demurred. It was held, that such writs of *scire facias* were made returnable sometimes at a day certain, and sometimes on common days; but that this writ returnable on a day certain *ubicunque*, &c. was bad, for it ought to be returnable on a common day, if it be *coram nobis ubicunque*, &c.

Rex v. Hare and Mann,  
1 Str. 146.

A *scire facias* returnable *ubicunque tunc fuerit* generally, is good, without limiting it to *England*. But, if made returnable *ubicunque tunc fuerit in magnâ Britannia*, it is bad.]

Velv. 112. If two *nibils* are returned on a *scire facias*, this amounts to a warning.

There



There must be two *nibils* or a *scire feci* returned upon a *sci. fa.* for two *nibils* amount to a garnishment.

Yelv. 88.  
& vide  
Skin. 633.

\*where it is said to be the constant practice of B. R. to sue both the *scire facias*'s at once, in regard that there ought to be a full time between the date of the second *scire facias*, and the return of it. But by a rule of court E. 5 G. 2. every *scire facias*, of which notice shall be given to the defendant or defendants named in such writ, shall be delivered to the sheriff to whom directed, or left at his office four days before the return of such writ *exclusive* of the day on which such writ is returnable. — By the same rule every first writ of *scire facias* on which a *nihil* shall be returned, shall be delivered to the sheriff, or left in his office *some time* before the return of such writ. — Also, every writ of *alias scire facias* shall be delivered to the sheriff, or left in his office four days exclusive before the return of such writ. *Vide* Harrison's Practice of K. B. 258, &c.\* [But note, this rule extends only to a *scire facias* against bail: a *scire facias* in error needs not lie in the office four days before the return of it. Millar v. Yerraway, 3 Burr. 1723. Gros v. Nash, 4 Burr. 2439. But, where it is against bail, it must lie the last four days before the return. Forty v. Hermer, 4 Term Rep. 583. In the case of Obrian v. Frazier, 1 Str. 644. it is said, that if the *scire facias* lies four days in the office, that is all which is required: that the summons may be made at any time before the court is up on the day of the return. And so is Hunt v. Coke, 3 Burr. 1360. But in Poole v. Willis, E. 16 G. 3. 2 Term Rep. 758. n. proceedings in a *scire facias* against bail were set aside, because the sheriff had summoned the party on the return day after the rising of the court; and in Webb v. Harvey, 2 Term Rep 757. they were set aside on the authority of that case, because the bail were summoned only an hour before the court rose on the return day.]

It hath been adjudged, that in a *sci. fa.* it is sufficient that there be (a) 15 days inclusive between the teste of the writ of the first *sci. fa.* and the return of the second.

Carth. 468.  
2 Salk. 599.  
pl. 7.  
& vide

2 Jon. 228. Cro. Eliz. 738. (a) Where there were but 14 days between the teste and return of the *sci. fa.*, the court held it aided by the statute 17 Car. 2. c. 8. Lutw. 26.

But, where two *sci. fa.* were taken out with the same teste, but different returns, the one returnable in *Quinden. Hill.*, and another *Craffin. Pur.*, though there were different returns and at convenient distances, yet because they were actually taken out at one time, it was adjudged wrong; for thus the party would lose the benefit of two *sci. fa.* which the law gives him.

6 Mod. 86.  
per cur.

[If there be fifteen days between the teste of the first and the return of the second *scire facias* against bail, it is sufficient, without any regard to the number of days between the teste and return of each.

Elliot v.  
Smith,  
2 Str. 1139.

But, where there is only one *scire facias*, the sheriff returning *scire feci*, and the proceedings are by bill, four days exclusive between the teste and return are sufficient.]

Bell v.  
Jackson,  
4 Term  
Rep. 663.

It is a general rule, that the *sci. fa.* must pursue the first action; and therefore where an action of debt was brought in *Cumberland*, and judgment had by confession, and a *sci. fa.* brought thereon against the executor in *Middlesex*, this was held to be erroneous, though the confession was at *Westminster*, and that the *sci. fa.* ought to have been brought in *Cumberland*.

Cro. Jac.  
331.  
Yelv. 218.  
Hob. 4. S.C.  
Wharton v.  
Sir Edward  
Mufgrave.

On a recognizance taken in B. R. the *sci. fa.* must be brought in *Middlesex*, for the recognizances there are not obligatory by the caption, but by their being entered of record in the court. So it is of debt.

2 Salk. 600.  
pl. 10.

But on a recognizance in C. B., the *sci. fa.* may be laid in the county where the caption was, or in *Middlesex* where it is filed; for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there; and it is also filed at *Westminster* in C. B., and there remains of record.

2 Salk. 600.  
pl. 10.  
But for this  
diversity vide  
Still. 9.  
All. 12.  
Hob. 195.

[In

Follett v. Trill, Barnes, 96. Pickering v. Thompson, *Id.* 207. [In *C. B.*, where the caption is in another county, and enrolled in *Middlesex*, the *scire facias* may be in either county; but, where the caption is in *Middlesex*, the *scire facias* must be there.]

Cro. Car. 313. Also, though regularly the first *sci. fa.* upon a recognizance to have execution, ought to be in the county where it was acknowledged; yet, if it be returned that he hath no lands there, that no heir can be found, or that the party is dead, a *testatum sci. fa.* may issue to any other county where the party surmisseth that there are lands.

2 Lutw. 1287. Redman v. Winford. It hath been resolved, that a *sci. fa.* on a recognizance of bail taken by commissioners in the county of *York*, may be brought in *Middlesex* or *York*, at the election of the party.

Bond v. Isaac, 1 Burr. 409. [A *scire facias* sued out on a bail-piece remaining in *Middlesex*, must be sued out in *Middlesex*, though the original cause of action were in *London*.

1 Term Rep. 338. Dixon v. Heslop, 6 Term Rep. 366. Phillips v. Brown, 6 Term Rep. 282. A *scire facias* to revive a judgment in this case, is a continuance of the first suit. Hence, whatever engagements would be binding on the principal, will be so on his representatives. So, the proceedings on a *scire facias* against the bail, shall be in the same court with those against the principal, and if the latter be carried back by *procedendo* to an inferior court, a *scire facias* afterwards removed thereout against the bail shall be likewise remanded. So, the costs of a *scire facias* after bankruptcy to revive a judgment recovered before the bankruptcy, relate back to the original judgment, and are recoverable under the commission.

Guillam v. Hardisty, 3 Salk. 320. 1 Ld. Raym. 236. S. C. Where a *scire facias* is brought in *B. R.* upon a judgment in an inferior court, it must appear by the writ itself how the judgment came into *B. R.*, whether by *certiorari*, or by writ of error, because the execution is different: for if it came by *certiorari*, the *scire facias* must set forth the limits of the inferior jurisdiction, and pray execution within those limits, and also that the judgment came in by *certiorari*. But, if it came in by writ of error, that must be shewn likewise in the *scire facias* itself, and it must pray execution generally.

Eden v. Wills, 1 Ld. Raym. 141. It was moved to quash a *scire facias quare executionem non*, &c., sued by the defendant in error to make the plaintiff assign his errors, because the original suit in *C. B.* was by bill of privilege, and the *scire facias* ought therefore to be returnable on a day certain, but this was made returnable upon a common return. And of that opinion was the court, because the *scire facias* ought to be made returnable according to the nature of the original suit below in *C. B.* And *Trin. 11 Ann.* between *Vavasor* and *Parker* it was adjudged so by the court of *B. R.* in the very same case. And the writ of error was quashed.

Mara v. Quin, 6 Term Rep. 1. Where an executor pleads *plene administravit*, and the plaintiff does not take issue upon it, but takes a judgment of assets, *quando acciderint*, the *scire facias* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment; if it pray execution of assets generally, without

without confining it to that time, it cannot be supported, because it does not pursue the terms of the judgment, on which it is founded.

Upon the same principle, a *scire facias* on a judgment against a person who has been twice a bankrupt, under the stat. 5 G. 2. c. 30. § 9. which says "the future estate and effects of such person shall be liable to his creditors, *unless* the estate shall produce sufficient to pay 15*s.* in the pound," &c. is bad, if it do not aver, that the bankrupt's estate is sufficient to produce 15*s.* in the pound.

If the defendant dies after a writ of inquiry executed, and before the return, and the *scire facias* is, to shew cause why a new writ of inquiry should not be awarded, it shall be quashed; for it should be, to shew cause why the damages assessed should not be recovered.]

If there be a judgment in debt against *A.* and *B.*, one *sci. fa.* will not lie thereon against the heir of *B.*, and another against *A.*, for the *sci. fa.* ought to pursue the judgment, and that being joint, so ought the *sci. fa.* to be, for otherwise there would be several independent suits.

Gill v. Scrivens, 7 Term Rep. 27.

Goldf-worthy v. Southcott, 1 Willf. 243.

2 Salk. 598. pl. 1. Carth. 105. S. C. & vide Skin. 82. pl. 24.

## (E) Pleadings to a *Sci. Fa.*

**A** *Sci. fa.*, whether considered as an original or judicial writ, is an action, and such as the defendant may (*a*) plead to; and therefore it is held, that a release of all actions, or all executions, is a good bar to a *sci. fa.* So, in a *sci. fa.* on a fine, a release of all actions is a good plea in bar.

Lit. sect. 506. Co. Lit. 291. (a) A man may plead in bar or abatement to a

*Sci. fa.* as well as to other actions. The plea in bar is always concluded by an *executio non*, as in other cases by an *actio non*. 10 Mod. 112. Yelv. 218. [But the *scire facias* being an action, the conclusion by an *actio non*, though somewhat informal, will yet not vitiate the plea. Grey v. Jones, 2 Willf. 251.]

But the defendant cannot regularly to a *sci. fa.* to have execution of a judgment, plead that which might have been pleaded to the original action; as, where *A.*, as administrator to *J. S.*, by virtue of administration granted to him by the Archbishop of *Canterbury*, brought debt against *B.* and had judgment to recover, and after the year brought a *sci. fa.* on the judgment; the defendant pleaded that the intestate died in *London*, and had not *bona notabilia* in divers dioceses, and that after the judgment the Bishop of *London* committed administration to the wife; upon demurrer it was held, that this was a matter he could have pleaded before, and that it was annulling the record, which is not sufferable.

Cro. Eliz. 283. Allen v. Andrews. [So, Trail v. Edwards, 6 Mod. 308. Earl v. Hinton, 2 Str. 732. Skelton v. Hawling, 1 Willf. 238. Wharton v. Richardson,

2 Str. 1175. Ramsden v. Jackson, 1 Atk. 292. Erving v. Peters, 3 Term Rep. 685.]

So, where in a *sci. fa.* on a judgment the defendant pleaded the statute of usury, it was held no plea, because he should have pleaded it to the original action.

Skelton v. Hill, Cro. Eliz. 588. Bush v. Gower, Ca. temp. Hardw. 233. 2 Str. 1043. S. C. Cooke v. Jones, Cowp. 727. From the two last cases, it seems, the court will try to relieve against the usury on motion.]

Rowe v. Bellafays, 1 Sid. 182. [So, Mid-

So,

Salk. 2. So, if a *sci. fa.* be brought on a judgment in assise for the office  
 pl. 5 2 Ld. of marshal, the defendant cannot plead, that the plaintiff was an  
 Raym. 853. alien enemy, for this was pleadable to the assise; and as he ad-  
 West v. mitted the plaintiff able to have judgment, he cannot now dis-  
 Sutton. able him from having execution.

Salk. 600. But a diversity is held between a *sci. fa.* upon a judgment in  
 12 Mod. debt and in ejectment, and that in the last, a stranger may contro-  
 499. vert the original title, but those that claim under the judgment are  
 estopped and bound by it.

Dyer, 377. a. In a writ of annuity for an annuity granted to a seneschal for  
 holding courts, there was judgment for the annuitant, who brought  
 a *sci. fa.* for arrearages incurred *after* the judgment; to which the  
 defendant pleaded, that the seneschal, though often requested, re-  
 fused to hold any court, and this was held a good plea.

Goldf. 170. The sheriff levied the debt on the defendant's goods, but  
 Foe v. Bol- did not return the writ; whereupon the plaintiff brought a  
 ton, vide tit. *sci. fa.* against the defendant to shew cause why he should not  
 Execution. have execution on the same judgment; to which the defendant  
 pleaded, that the sheriff had levied the debt on his goods, &c.,  
 and this was held a good plea.

3 Lev. 119. But, where to a *sci. fa.* on a judgment the defendant pleaded,  
 Kettleby v. that the sheriff had levied part upon a *fi. fa.*, and that after it was  
 Hales. agreed between the plaintiff and defendant, that the defendant  
 should pay the under-sheriff 10*l.* in full satisfaction for the residue,  
 and that he paid it accordingly; on demurrer, the plea was held  
 insufficient, payment being no plea in debt upon a bill obligatory;  
*a fortiori*, not in debt upon a judgment of record.

But now by the 4 & 5 Ann. cap. 16. § 12. it is enacted, "That  
 "where an action of debt shall be brought upon any single bill,  
 "or where debt or *sci. fa.* shall be brought on any judgment, if  
 "the defendant hath paid the money, such payment may be  
 "pleaded in bar."

2 Roll. Rep. It seems agreed, that a general non-tenure is not a good plea to  
 54. a *sci. fa.* upon a judgment in a personal action, because it fal-  
 Cro. Eliz. sifies the sheriff's return; but that in a *sci. fa.* to have execution  
 872. of a judgment in a real action, one may plead non-tenure against  
 6 Mod. 134. the return of the sheriff, because of the high regard the law has to  
 226. the freehold.  
 2 Ld. Raym  
 854.  
 Salk. 40. pl. 9. 2 Salk. 679. pl. 7.

Owen, 134. But a special non-tenure may be pleaded to a *sci. fa.* upon a  
 3 Lev. 205. judgment in a personal action; as to a *sci. fa.* on a judgment for  
 debt or damages against tenant for years, he may plead that he  
 has only a term for years.

2 Roll. Rep. If one joint-tenant is returned, he may plead that another is  
 54. vide tenant of a moiety.  
 54. *ra.*

Henderfon [If to a *scire facias* against bail they plead, that the principal  
 v. Withy, died before the return of any *ca. fa.*, a replication stating a parti-  
 2 Term Rep. cular *ca. fa.*, and that the plaintiff was alive at the return of that  
 576. So, *ca. fa.* must conclude with an averment; for the *ca. fa.* in the  
 Filwood v. replication  
 Popplewell,

replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it.

Judgment on a *scire facias* cannot give damages for delay of execution; but if it does, it may be reversed for that, and affirmed *pro residuo*. But, when the jury found that plaintiff was *damni- fied, and put to costs to 6d.*, it was holden to be well enough; for it is only meant as a foundation for the costs *de incremento*. Damages may mean costs.

2 Will. 65.  
Chandler v.  
Roberts,  
Doug. 58.  
Henriques v.  
Duchess of  
India Com-  
pany, 2 Str.  
807. 2 Ld.  
Raym. 1532.  
Knox v.  
Costello, 3 Burr. 1789.

As no damages are recoverable in a suit upon a *scire facias*, so no costs were recoverable therein previously to the statute of 8 & 9 W. 3. c. 11. the third section of which enacts, "That in all suits upon any writ or writs of *scire facias*, the plaintiff, obtaining judgment, or any award of execution, after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit*."

It has been adjudged, that this action does not extend to executors or administrators; therefore, if the plaintiff or defendant in this action, sue or be sued in that capacity, he is not liable to costs.

Bellew v.  
Aylmer,  
1 Str. 188.  
Smith v.  
Hammer, 1 Lill. Pr. Reg. 475. G.

Neither are any costs payable, where a writ of *scire facias* is quashed before plea pleaded, or abated by plea. As, where, upon a motion by the plaintiff to quash his own *scire facias*, the defendant insisted upon costs, alleging, that he had entered an appearance, and thereby incurred expence; it was determined, that costs were never due in proceedings on a *scire facias*, until a declaration was delivered, and the defendant had pleaded.

Huer v.  
Whitebread,  
Caf. Pr.  
C. P. 74.  
Pr. Reg.  
378. S. C.  
Pool v.  
Broadfield,  
Ca. Pr. C. P. 209. Pr. Reg. 378.

So, the plaintiff moved for leave to quash a writ of *scire facias*, the defendant having pleaded thereto in abatement, which was granted without costs. And by the court—It is the same in a *scire facias*, as in an action, where you plead in abatement, and the plaintiff's writ is abated, he pays no costs. But, they added, that, if there had been no plea in abatement, and the party had moved to quash his own writ, they would have made him pay costs.]

Pocklington  
v. Peck,  
1 Str. 638.

## Sequestration.

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(A) The Nature and first Introduction of such Process.

(B) In what Cases to be awarded : And herein,

1. Against what Persons.
2. To what Places.
3. What Estate or Interest shall be liable to a Sequestration, and from what Time.

(C) Of the Power and Duty of the Sequestrators.

(D) Sequestration, when determined.

(A) The Nature and first Introduction of such Process.

(a) There must be a serjeant at arms after the return of the commission of rebellion before a sequestration can issue; and the reason hereof is, that the court will not issue process upon the whole lands and goods of the defendant, till one of its own officers see that the defendant do totally disappear. *Gilb. Hist. Ch. 77. Vide Prced. Chan. 549, &c.*

**A** Sequestration out of chancery is grounded on the return of the (a) serjeant at arms, wherein it is certified that the defendant hath secreted himself; and therefore this process issues, and gives authority and power to the sequestrators (who are persons of the plaintiff's own naming) to enter upon and seize his, the defendant's, real and personal estate.

*Gilb. Hist. ch. 78. Cro. Eliz. 651. Brograve v. Watts. (b) Mod. 259.— But 2 Mod. 258. That the Chancery having issued such sequestration, it will be as binding as any other process according to the rules of the common law. (c) 2 Chan. Ca. 44.*

It appears, that there were great struggles between the common law courts and courts of equity before this process came to be established. The former held, that a court of conscience could only give remedy *in personam*, and not *in rem* (b); that sequestrators were trespassers, against whom an action lay; and in the case of (c) *Colston v. Gardener* the Chancery cites a case, where they ruled, that if a man killed a sequestrator in the execution of such process, it was no murder.

*Gilb. Hist. ch. 78. 2 P. Wms. 621. 2 Chan. Ca. 44.*

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires that the decrees of this court, which preserve men from deceit, should not be rendered illusory, that they could not long stand; but this process got the better of these resolutions on these grounds; 1<sup>st</sup>, That the extraordinary jurisdiction might punish contempts by the loss

of estate as well as imprisonment of the person, because that liberty being a greater benefit than property, if they had a power to commit the person, they might take from him his estate, till he had answered his contempts. 2dly, To say that a court should have power to decree about things, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the court itself.

It has been said, that the first instance of a sequestration after a decree was Sir *Thomas Read's* case in Lord *Coventry's* time, and that it was afterwards awarded in chancery in the case of *Hyde v. Pettit*, 1666, and affirmed in parliament, and by the court of exchequer, *Gnavus v. Fountaine*, 1687, and since, without scruple. The doubt formerly was, that lands were not liable to execution before the statute *Westm. 2. 13 Ed. 1. 1. cap. 18*.

In *Vernon's Reports* it is said, that sequestrations were first introduced in Lord *Bacon's* time, and then but sparingly used in process, and after a decree to sequester the thing in demand only.

[It is now, however, become the common process in courts of equity, and may be said to be two-fold, that is, it issues either as mesne process on the defendant's default in not appearing, or not answering, after the whole process of contempt hath spent against him; or, it issues as a judicial process in pursuance of a decree, and to enforce the performance of it; and it is the execution and life of a court of equity; and as it is the fruit of a long suit, it is to be favoured, and in this case it is said to be analogous to an execution at common law.

The order for the sequestration after a decree is, in the first instance, only *nisi*.

A sequestration shall not be granted upon petition (a), nor without oath (b).

(b) *Harris Ch. Pr. 261.* but *qu.* the reference. In the case of *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 110. a sequestration was ordered by Lord *Macclesfield* against the Countesses of *Shaftesbury* and *Gainborough*, for a contempt in marrying an infant, who was under the protection of the court. But, upon this matter being brought before the Lords Commissioners, after the removal of Lord *Macclesfield*, it was observed by Lord Commissioner *Gilbert*, that this contempt was *not* *seworn* upon the Lady *Gainborough*; whereas an order for sequestration in the case of a peer, or a commitment in the case of a common person, is a judicial act of the court, and therefore must be founded upon a proper affidavit, as he apprehended. The order is the judgment of the court, the sequestration or commitment is but the execution of it. The judgment therefore is to be founded upon truth, and not upon a conjecture only. For, if she be examined upon interrogatories, this will not make good the determination of the court by a matter *ex post facto*. *Glib. Eq. Rep. 178.*

Upon affidavit of opposition to sequestrators, the court of exchequer will issue a writ of assistance.

It was once a question, whether the court of exchequer could grant a sequestration after a decree for a personal duty? It was admitted, that in process for appearance a sequestration was always grantable by that court, but for a personal duty after a decree there were many instances in my Lord *C. B. Hale's* time, and in the Lord *Montague's* time, where it had been denied, and the precedents that had been produced for it, were most of them where it was the suit of the king; and it was admitted on all hands, that where the king was plaintiff it might be granted. But by the opinion of

Chan. Ca.  
92.  
2 Chan. Ca.  
44.

Vern. 421.

1 Fowl.  
Exch. Pr.  
170.

1 P. Wms.  
308.

3 Br. Ch.  
Rep. 373.

(a) Rules  
and Orders  
of Chancery,

Granfield  
v. Baker,  
Bunb. 168.

Guavers v.  
Fountain,  
2 Freem. 99.

of *Jenner*, *Heath*, and *Powell*, Barons, it ought to be granted; for they thought, that if it might be granted in mesne process, where it did not appear whether there was any duty or not, *à fortiori*, after a decree where the duty was adjudged and ascertained. And it being always the practice of the Chancery, it ought much more in this court, where the plaintiff was supposed to be a debtor to the king. And they thought, that the jurisdiction of the court of equity would be to little purpose, if the court had not sufficient authority to see their decrees executed.—The Lord Chief Baron doubted, because the Lord Chief Baron *Hale* could never be prevailed with to grant it, nor the Lord *Montague*, to whose learning, he said, he must greatly subscribe.—But by the opinion of the other three it was granted.]

## (B) In what Cases to be awarded: And herein,

### 1. Against what Persons.

2 P. Wms. 385. — **A** Sequestration *nisi* is the first process against a peer or member of the House of Commons.  
A sequestration granted against an infant peer. 2 Chan. Ca. 163. — That formerly an attachment lay. Comb. 62. — That it must be founded upon a proper affidavit, being a judicial act of the court. Gilb. Eq. Rep. 178.

2 P. Wms. 535. — A sequestration is also the first process against the menial servant of a peer, within the words and meaning of the statute 12 & 13 W. 3. c. 3. for that otherwise such servant would have greater privilege than his lord.

2 P. Wms. 385. — If there be a sequestration *nisi* against a peer for want of an answer, and the peer put in an answer, that is insufficient, yet the order for a sequestration shall not be absolute, but a new sequestration *nisi*.  
[*Vide supra*, 5 vol. 643.]

2 Ch. Ca. 44. — [If before a sequestration is awarded, the defendant shall have conveyed his land by covin, the sequestration shall be awarded against the defendant and his assigns, and the person to whom the land is assigned may be taken upon the sequestration.]

### 2. To what Places.

Vern. 76. — Notwithstanding the superintendant power of the courts in this kingdom over those in *Ireland*, and what is said in some of our books, it seems to be now the better opinion, that the Court of Chancery here cannot award a sequestration against lands in *Ireland*.  
2 Chan. Ca. 189.  
2 P. Wms. 261.

2 P. Wms. 261. — It was said, that such process had been awarded to the governor of *North Carolina*; but herein it was doubted, whether such sequestration should not be directed by the king in council, where alone an appeal lies from the decrees in the plantations.

Darwent v. Walton, 2 Atk. 510. — [Where a defendant is out of the reach of the court, and cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of an appearance, and carried it through the whole line of process to a sequestration. And therefore  
8



therefore where a bill for an account is filed against two partners, one of whom is out of the kingdom, the court will decree an account to be taken, and that the whole which appears to be due shall be paid by the defendant partner, who is brought to a hearing.]

### 3. What Estate or Interest shall be liable to a Sequestration, and from what Time.

Copyholds may be sequestered, though not extendible at common law or the statute of *Westm. 2.* (13 *Ed. ff.* 1.) for courts of equity have *potestatem extraordin' et absolutam*. But it seems a doubt, whether such a sequestration can be revived against the heir of the copyholder, for if it should, the heir would possibly not take up those lands; and then the lord would be without a tenant.

[Where lands of the husband, out of which an annuity to the wife issued, were sequestered, the husband dying, the sequestration was discharged as to the annuity.]

If a prebendary has a distinct corpse, or estate incident to his prebend, it may be sequestered: but, where he is only a member of the body aggregate; and the inheritance is in the dean and chapter, there cannot be a sequestration.]

A sequestration out of Chancery is more effectual than an execution by *fi. facias* at law; for, a sequestration may be against the goods, though the party is in custody upon the attachment; whereas at law, if a *capias ad satisfaciendum* is executed, there can be no *fi. fa.* issued.

[But no sequestration lies, until the time for the return of the attachment, upon which the body was taken, is out.]

Where the sequestrators seize the real estate of the party, any tenant or other person who claims title to the estate so sequestered, either by mortgage, judgment, lease, or otherwise, who hath a title paramount to the sequestration, shall not be obliged to bring a bill to contest such title, but he shall be let in to contest such a title in a summary way.

He may move by his counsel as of course to be examined *pro interesse suo*; and in this case the plaintiff is to exhibit interrogatories in order to examine him for a discovery of his title to the estate, and he must be examined upon such interrogatories accordingly; and the Master must state the matter to the court, and the parties may enter into proof touching the title to the estate in question; and when the Master hath stated the whole matter, the court proceeds to give judgment therein upon the report; and if it appears that the party who is examined *pro interesse suo* hath a plain title to the estate, and is not affected with the sequestration, then it is to be discharged as against him, with or without costs, as the court shall determine upon the circumstances of the case, and so *vice versa*.

Martin v. Willis, May 10, 1745. in *Seacc.* 1 Fowl. Excheq. Pr. 188. [A person claiming title to goods seized under a sequestration, obtained an order, that the party prosecuting the sequestration might exhibit interrogatories against him, to examine him *pro interesse suo*, and in the mean time that the goods might be restored to him on his giving security.]

N. B. This order was directed to be made by the court similar to that in *Mackenzie v. the Marquis of Powis*, 6th July 1739, which was settled by the court.

1 Br. Ch. Rep. 434. Papers had been delivered out several years, for the purpose of being examined, and an order had been made, that they should be restored. Application had been made for the return, and refused. The order had been served personally, but no writ of execution of the order had been served or sued out. It was moved for a sequestration *nisi*, and the rule was granted as of course.]

Vern. 58. The sequestration binds from the time of awarding the commission, and not from the time of executing it and its being laid on by the commissioners only; for if that should be admitted, then the inferior officer would have *ligandi et non ligandi potestatem*.

### (C) Of the Power and Duty of the Sequestrators.

THE sequestrators are officers of the court, and as such are amenable to the court, and are to act from time to time in the execution of their office as the court shall direct. They are to account for what comes to their hands, and are to bring the money into court as the court shall direct, to be put out at interest, or otherwise, as shall be found necessary. But this money is not usually paid to the plaintiff, but is to remain in court till the defendant hath appeared or answered and cleared his contempt, and then whatsoever hath been seized shall be accounted for and paid over to him. However, the court have the whole under their power, and may do therein as they please, and as shall be most agreeable to the justice and equity of the case.

The plaintiff's counsel may move and obtain an order for the tenants to attorn and pay their rents to the sequestrators, or for the sequestrators to sell and dispose of the goods of the party, and to keep the money in their hands, or to bring it into court, as shall be most advisable and discretionary, and fitting for the court to do.

Wood v. Freeman, 2 Atk. 542. Hawkins v. Crook, 3 Atk. 594. [A sequestrator is not entitled to any stated fee; nor can he call upon the plaintiff for any fee, before he has made a return of what he has seized under the sequestration.]

Vern. 248. Sequestrators on mesne process are accountable for all the profits, and can retain only so far as to satisfy for contempt.

Vern. 161. If sequestrators, having power to sell timber, dispose of 7000 l. worth, and only bring 2000 l. to account, they, as officers and agents of the court, are responsible, and not the plaintiff.

A se-

A sequestration is in nature of a *levari* at common law, and the party sequestering has neither *jus ad rem vel in re*; the legal estate of the premises remaining in every respect as before. 1 P. Wms. 397.

Sequestrators being in possession of a great house in *St. James's Square*, which was the defendant's for life, the court ordered that the Master allow a tenant for the house, and the sequestrators to make a lease, and the tenant to enjoy it. 3 Ch. Rep. 87.

It was moved, that the irregularity of a sequestration might be referred to the deputy, which was taken out against the defendant for not appearing, by reason of its being taken out sooner than by the course of the court it could, and yet the sequestrators had taken the goods off the premises, and threatened to sell them: the Chief Baron said, that as to the carrying the goods off the premises, it was clear the sequestrators could do that, because a sequestration upon mesne process answers to a *distringas* at law. But however, as to selling them, the court agreed in the present case it could not be lawful, and said it had lately been settled on debate; and observed further, that courts of equity could not authorise sequestrators to sell goods even upon a decree until Lord *Stamford's* act, which makes decrees in this respect equivalent to a judgment. And even now, the counsel said, sequestrators cannot sell but by leave of the court: however, the court said, this was a matter proper for them to consider upon another occasion, and therefore only referred the irregularity of the sequestration as to the point of time to the deputy.

Desbrough v. Crombie, Barnard. Rep. 212. in *Seacc.* [This case is also reported by Bunbury, pag 272. under the name of Desbrow v. Crommie, but the statement of facts, as well as the language of the court, is different. It is as follows:—A sequestration issued against the

defendant *for want of an answer*: the sequestrators entered the defendant's house, and removed all the goods, to the value of seventy pounds at least, though the thing in demand by the bill was little more. It was moved to have restitution of the goods, in regard the removal of them was not in the power of the sequestrators without a particular order of the court for that purpose. And *per curiam*—There is a difference between a sequestration for want of an appearance, and for want of an answer. Even in the first case, it is to be looked upon as a *distringas in infinitum* at law; and the distress *there* ought to be only, at first nothing, then increasing by degrees\*, as the court directs, in order to compel an appearance: so the sequestrators ought in the first case, after seizure of some goods, to apply to the court for further directions for seizure, in order to compel an appearance. But, in the second case, the sequestrators have no power to remove any goods, much less to sell: for the goods are only to be retained in nature of a pledge to answer the contempt; and the plaintiff receives no injury by this, for he may set down his cause, and his bill may be taken *pro confesso*. And in this case the sequestrators had a day given to shew cause why an attachment should not go against them.]

[It was moved to sell goods taken on a sequestration upon mesne process: but Lord *Thurlow* refused the motion, a sequestration upon mesne process being only to found the further process of taking the bill *pro confesso*. Hales v. Shafto, 3 Br. Ch. Rep. 72.

The defendant was prosecuted to a sequestration for want of an answer; and the sequestrators having taken eleven hogheads of cyder, and other perishable commodities, the plaintiff petitioned to have them sold. But the court refused to do it, until the hearing of the cause, and ordered the petition to come on at the same time with the cause. And now they came on to be heard together, and the bill was taken *pro confesso* against the defendant; Wilcocks v. Wilcocks, Ambl. 421. at the Rolls.

[\* A distress, where there is *nothing* seized, and a *gradual increase* of that *nothing*, should appear to common understandings rather extraordinary.]

and the cyder and other perishable goods were ordered to be sold by auction, and the money to be paid into the Bank, subject to the further order of the court.

1 Vez. 183.  
4. per Lord  
Hardwicke.

A sequestration partakes not of the nature of a *feri facias*, but of a writ of extent on a recognizance or *disfringas*, vesting no right in the party, because the execution is not complete, but a further act of the court necessary; which whether by process or order makes no difference: and that further act is, that after seizure by the commissioners of the goods and profits of the lands, and return to the court, the party must apply to the court, to have an account of the sequestration taken, and an order made for sale of the goods towards satisfaction of the duty decreed him, without which he cannot have it. For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff, but only to detain and keep in their hands until the sum is duly paid, the contempts cleared, and the court make further order to the contrary. It is not of a great many years standing, that the court has ordered goods to be sold *to satisfy payment after a decree*: but it is very lately, that the court has ordered it for a collateral contempt in proceeding *before a decree*; which that court now does in aid of its proceedings.

Civil v.  
Smith,  
3 Br. Ch.  
Rep. 362.

Where there had been an order for payment of money, and the party was in contempt for non-payment, and a sequestration had issued, and the goods were taken; the sequestrators were ordered to sell the goods.

Yarroth v.  
Seys, Bunb.  
62.

Upon a commission of sequestration, the commissioners sequestered some live cattle, which not being sufficient to answer the debt, it was moved to sell. But the motion was denied, because the commissioners had not returned the commission. But when that was done, and it appeared what they had sequestered, and the value as to so much in part of the debt, then for the remainder, a new sequestration should issue, and a *venditioni exponas* to sell the goods sequestered upon the first.

The act of 5 Geo. 2. c. 25. empowers the plaintiff to go on, as well upon a sequestration for not appearing, as upon a sequestration for not complying with a decree, which could not be done in equity until then; for according to the first section of that act, where a person does not enter an appearance within the usual time after a subpoena issues, and there is just ground to believe, supported by affidavit, that he is gone out of the kingdom to avoid the process, the court out of which the process issues, is to sue a day for his appearance, to be inserted in the *London Gazette*, and published on the Lord's Day in the parish church of the defendant: and a copy of the order of the court is to be posted up in some publick place at the *Royal Exchange* in *London*, if such order be made by the Court of Chancery, Court of Exchequer, or Court of the Duchy Chamber of *Lancaster*; but, if by any of the courts of equity of the Counties Palatine of *Chester*, *Lancaster*, and *Durham*, or of the Great Sessions in *Wales*, then in some publick place in some market-town within the jurisdiction of any such court, nearest to the place of the defendant's usual abode, if within the jurisdiction.

jurisdiction; and on the defendant's not appearing within the time limited by the court, the court may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as they shall think just, and to enforce it, may order the defendant's estate or effects to be sequestered, and the plaintiff to be satisfied his demand out of the estate and effects so sequestered, he first giving security to abide such order touching the restitution thereof as the court may make, upon the defendant's appearing to defend the suit, and paying such costs as the court may order; but in default of such security being given by the plaintiff, the court shall order the estate and effects sequestered to remain under their direction, either by appointing a receiver, or otherwise, until the defendant shall appear to defend the suit, and pay such costs to the plaintiff as the court shall think reasonable, or until such order shall be made therein as the court shall think just.

Although a sequestration issues only as *mesne process* to compel an answer, yet, if there is any duty to be performed, it shall remain notwithstanding the defendant offer to pay the costs of the contempt. Maynard v. Pomfret, 3 Atk. 468.

The court cannot make an order under a sequestration to sell a subject, which passes by title and not by delivery. Shaw v. Wright, 3 Vez. jun. 22.

Lands were decreed to be liable to 5000 *l. per ann.* for the life of *A.* and a sequestration and injunction for the possession to that purpose; the defendant against the injunction enters upon the lands, and receives the profits to the value of 1972 *l.* and thereupon was decreed to pay it; and after the death of *A.* it was decreed, that the sequestration should continue against the defendant for the payment of that money: and now the defendant moved to have liberty to fell timber to raise money for his subsistence, alleging, that the sequestrators had only the possession and the perception of the annual profits by the course of the court, and therefore it could be no prejudice to have this granted: But Sir *H. Grimsdon*, Master of the Rolls, refused. For 1st, This invades the decree which is for the quiet possession, which will be disturbed if the defendant enters to cut down timber. 2dly, The defendant not having performed the decree by the payment of the money, he shall not receive any favour from the court whilst he stands in contempt. 3dly, If he will with the sale of this timber pay the plaintiff his debt and so discharge the sequestration, there might be some reason for it; but for him to raise monies to other purposes, he shall not be favoured; and unless the plaintiff will consent, he shall not have liberty to fell. 4 Feb. 16 & 17 Car. 2. in Can. Sands v. Darrel.

[Where a bill is taken *pro confesso* for want of an answer, *qu.* whether the decree shall be absolute, or only *nisi* ?] Howell v. Ld. Coningsby, Bunb.

219. Hughes v. Owen, *Id.* 299.

### (D) Sequestration, when determined.

**A** Sequestration that issues as a *mesne process* of the court will be discontinued and determined by the death of the party. Vern. 58. Vide infra.  
But, where a sequestration issues in pursuance of a decree, and

to compel the execution of it, there, though the same be for a personal duty, it shall not be determined by the death of the party.

Ch. Ca. 241. A sequestration against the father who appeared to be only  
2 Ch. Ca. 46. tenant for life, was on his death discharged.

Vern. 118. The bill was to revive a sequestration obtained against the defendant's husband for a personal duty before his intermarriage with the defendant, and to avoid the defendant's estate in dower in the lands that were sequestered before the marriage, it being insisted that those lands were so bound by the sequestration, and covered therewith, that the defendant's right of dower could never attach upon them. But on a demurrer to this bill, the demurrer was allowed; and it was ruled, that such a sequestration should not bind the feme who came in for her jointure or dower. But, whether the heir in fee-simple should in such case have the estate bound, and subject to such a sequestration, or not, was doubted; and the case not being before my Lord Keeper, he refused giving any opinion therein.

Vern. 166. Afterwards this last point came before the same Lord Keeper in another case, when his Lordship inclined to think that a sequestration for a personal duty determined with the death of the party, and could not be revived against the heir; but his Lordship took time to consider of it, and would be attended with precedents.

Bligh v. Earl of Darnley, 2 P. Wms. 621. It seems to be now settled, that a sequestration is a personal process, which abates by the death of the party; so that such sequestration being grounded on a decree for a debt or personal duty, cannot be revived against the heir of the defendant: otherwise, in those cases in which the heir is bound.

1 Vez. 182. White v. Hayward. 2 Vez. 464. *Sed contr.* Hawkins v. Crook, 3 Atk. 594.]

Anon. [A sequestration issued against J. S. for not performing a decree, under which lands were seized. J. S. died, whereupon it was moved, that the sequestration should be discharged. But the court refused it, because the sequestration was not returned, for the sequestrators are answerable for what profits they have received of the lands, and they have nothing to indemnify them, but the authority given by the sequestration.—But, the sequestration being returned, the court discharged it, as to the lands, from the death of J. S.]  
Bunb. 31.

## [Set-Off.

- (A) When first allowed.  
 (B) In what Actions.  
 (C) What Debts may be set-off.  
 (D) Where the Defendant must plead a Set-Off, and where he may give Notice of Set-Off; and herein, of the Form of each.

## (A) When first allowed.

A T common law, if the plaintiff was as much, or even more 2 Burr. 826; indebted to the defendant, than the defendant was indebted to him, yet he had no method of striking a balance: the only way of obtaining relief was to go into a court of equity. To remedy this inconvenience, it was enacted by the statute of 2 G. 2. c. 22. § 13. "That where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other; and such debt may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt intended to be insisted on, and upon what account it became due; otherwise such matter shall not be allowed in evidence upon the general issue."

Where a set-off is admissible, the parties are alternately plaintiff and defendant; so that if the cross demand or any part be within the statute of limitation, that objection may be replied to it, in like manner as it may be pleaded in bar to the declaration. Remington v. Stevens, 2 Str. 1271.

## (B) In what Actions.

A Set-off is allowable in actions of *debt*, *covenant*, and *assumpsit*, (a) Barnes; 450. Bull. N. P. 181. S. C. Graham v. Frairie, Hill 24 G. 2. for the non-payment of money; but not in *actions upon the case*, *trespass*, or *replevin* (a); nor of a penalty, in debt on bond conditioned for the performance of covenants (b); nor of *general damages* in covenant (c), or *assumpsit* (d). But, where a bond is

and Laycock v. Tuffnell, E. 27 G. 3. conditioned for the payment of an annuity (e), or of liquidated damages (f), a set-off may be allowed.

B. R. S. P. Tidd's Pr. 404. Sapsford v. Fletcher, 4 Term Rep. 511. (b) Bull. N. P. 179. 2 Burr. 1024. (c) Howlet v. Strickland, Cowp. 56. (d) Freeman v. Ryett, 1 Bl. Rep. 394. (e) Collins v. Collins, 2 Burr. 820. (f) Fletcher v. Dyche, 2 Term Rep. 32.

### (C) What Debts may be set-off.

IT having been doubted, whether mutual debts of a *different* nature could be set against each other under the above clause in the act of 2 Geo. 2. c. 22. it was enacted by 8 Geo. 2. c. 24. § 5. "That by virtue of the said clause, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty, contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side: and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

A debt barred by the statute of limitations we have seen cannot be set off: if pleaded, the statute may be replied to it; if offered in evidence under a notice of set-off, this objection may be made to it at the trial.

The debt sued for, and the debt intended to be set off, must be mutual, and due in the same right. Hence a defendant sued as executor or administrator cannot set off a debt due to him in his own right; nor, if sued for his own debt, can he set off a debt due to him as executor or administrator. Neither can a joint debt be set off against a separate demand, nor a separate debt against a joint one. Nor in an action against a man on his own bond, can he set off a debt due to him in right of his wife.

But a debt due to a defendant as a surviving partner, may be set off against a demand upon him in his own right: and *vice versa*.

Slipper v. Stridstone, 5 Term Rep. 493. French v. Andrade, 6 Term Rep. 582.

So, to an action brought by or against a *trustee*, a set-off may be made of money due to or from the *cestui que trust*.

It was formerly holden, that the statutes of set-off did not extend to assignees of a bankrupt: but it has been since determined, that



that in action at their suit, the defendant may set off a debt due to him at the time of the bankruptcy; for a note indorsed *after* the bankruptcy cannot be set off (*a*); and sets-off being in the nature of cross-actions (*b*) the defendant must shew, that the note, in respect of which he makes the cross demand, was indorsed to him, or, if payable to bearer, came into his possession before or at the time of the bankruptcy.

Ridout v. Brough, Cowp. 133.  
(a) Marsh v. Chambers, 2 Str. 1231.  
(b) Dickson v. Evans, 6 Term Rep. 57.

As in cases of bankruptcy the debt claimed to be set off must have existed at the time of the bankruptcy, so in other cases it must be in existence at the commencement of the suit, and must be so pleaded. If it were then in existence, the defendant's right to set it off cannot be affected by his having brought an action upon it, in which he has recovered a verdict, & the plaintiff has paid the money into court. Hence a judgment may be pleaded by way of set-off pending a writ of error.

M. 25 G. 3. B. R. 3 Term Rep. 188.

As a set-off cannot be pleaded to an action of covenant for *general* damages, so neither can uncertain damages be pleaded by way of set-off to an action of covenant for rent.

Wrigall v. Waters, 6 Term Rep. 488.

(D) Where the Defendant must plead a Set-Off, and where he may give Notice of Set-Off; and herein, of the Form of each.

**W**E have seen in the above clause of the statute of 8 Geo. 2. c. 22. that where either of the debts accrues by reason of a specialty, the debt intended to be set off must be pleaded in bar; and the defendant in his plea must aver what is really due; which averment is traversable.

Symmons v. Knox, 3 Term Rep. 65.

In all other cases, the defendant may either plead, or give notice of set-off at his election.

2 Burr. 1231. Bull. N. P. 179.

If, at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the set-off; and it is usually pleaded in country causes to save the trouble and expence of proving the service of a notice. But, where the sum intended to be set off is less than that for which the action is brought, a notice of set-off should be given.

Bull. N. P. 179.  
Tidd's Pr. 426-7.

The several parts of a plea of set-off are as several counts in a declaration; so that if one part be good, a demurrer to the whole plea is bad.

Dowland v. Thompson, 2 Bl. Rep. 910.

The notice of set-off should regularly be given with, or at the time of pleading the general issue. Though if it be not then given, the court will permit the defendant to withdraw the general issue, and plead again with a notice of set-off. And such notice may be given with the general issue, after the defendant has been ruled to abide by his plea.

Tidd's Pr. 407.  
2 Str. 1267.  
1 Term Rep. 634. *in notis.*

Fowler v.  
Jones, Bull.  
N. P. 179.  
(a) But,  
note, this  
was before  
the statute  
11 G. 2.  
c. 19. which  
gives the  
action for  
use and oc-  
cupation.

In point of form the notice should be almost as certain as a declaration : therefore where the notice of set-off was in these words, " Take notice that you are indebted to me for the use and occupation of an house, for a long time held and enjoyed, and now lately elapsed ;" this was holden insufficient (a) : and it afterwards appearing, that the debt intended to be set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the Chief Justice said, it was bad on that account also ; for if this had been shewn, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand.]

## Sheriff.

- (A) The Nature of his Office.
- (B) Who are qualified or exempt from serving.
- (C) Manner of appointing him ; and herein, of his Oath.
- (D) That he must attend the Office singly, and cannot execute any other.
- (E) How long to continue in his Office, and by what determined.
- (F) That he must be resident in his County, and whether he hath any Jurisdiction out of it.
- (G) Cannot dispose of his Bailiwick.
- (H) Of the High Sheriff's Power and Duty in appointing an Under-Sheriff and other Deputies : And herein,
  - 1. Of the Under-Sheriff, and in what Manner appointed.
  - 2. Of Covenants between the High-Sheriff, his Under-Sheriff, and other Officers.
  - 3. Of Acts that may be done by either of them, or where the High-Sheriff must himself be personally present.
  - 4. The Manner of approving Bailiffs and other Officers, and therein of his being answerable for their Acts.
  - 5. Of his Jurisdiction over Gaols and Gaolers.

(I) Of

(I) Of the preceding and succeeding Sheriff; and herein, of the Acts necessary to be done by each of them.

(K) Where more than one Sheriff.

(L) Of his Duty and Acts as a Judicial Officer.

(M) Of his Duty and Acts as a Ministerial Officer: And herein,

1. That he is the proper Officer to execute all Writs, except in Case of Partiality.
2. That he cannot dispute the Authority by which they issue, nor any Irregularity in them.

(N) How he is to execute such Writ: And herein,

1. That it must be without Favour or Oppression, and after such a Writ is actually taken out, and before it is returnable.
2. Of his raising the *Possé Comitatus*.
3. Of breaking open Doors.
4. Whether he can execute his Writ on a *Sunday*.
5. In what Manner he is to do Execution.

(O) Of his Duty in admitting Persons to Bail; and herein, of Securities taken for Ease and Favour.

### (A) The Nature of his Office.

IT seems that anciently the government of the county was by the king lodged in the earl or count, who was the immediate officer to the crown; and this high office was granted by the king at will, sometimes for life, and afterwards in fee. But, when it became too burdensome, and could not be commodiously executed by a person of so high rank and quality, it was thought necessary to constitute a person duly qualified to officiate in his room and stead, who from hence is called in *Latin*, *Viccomes*, and Sheriff from *Shire Reeve*, i. e. governour of the shire or county. He is likewise considered in our books as bailiff to the crown; and his county of which he hath the care, and in which he is to execute the king's writs, is called his *bailiwick*.

It is said by Lord Coke and Dalton, that *Earls*, by reason of their high employments and attendance upon the king, being not able to follow all the business of the county, were delivered of all that burden, and only enjoyed the honour as they now do, and that labour was laid upon the sheriff; so that now the sheriff doth all the king's business in the county. And the sheriff, though he

Dav. 60.  
Savil, 43.  
Roll. Rep.  
274. Co.  
Lit 168. a.  
Vide Pref. to  
9 Rep.  
7 Co. 33.

o Co. 49.  
Dalt. Sh. 2.

be still called *vicecomes*, yet all he doth, and all his authority, is immediately from and under the king, and not from or under the earl; so that at this day the sheriff hath all the authority for the administration and execution of justice which the count or earl had; the king by his letters patent now committing to the sheriff *custodiam com'*.

Co. Lit. 168. He is therefore at this day considered as an officer of great antiquity, trust, and authority, having, as Mr. Dalton observes, from the king the custody, keeping, command, and government (in some sort) of the whole county committed to his charge and care; and, according to my Lord Coke, he is said to have *triplicem custodiam*, viz. *vita justitie, vita legis, et vita reipublice*, &c.; *vita justitie*, to serve process, and to return indifferent juries for the trial of men's lives, liberties, lands, and goods; *vita legis*, to execute process and make execution, which is the life of the law; and *vita reipublice*, to keep the peace.

2 Inst. 558. It seems that anciently (a), and before the statute 9 Ed. 2. stat. 2. sheriffs were elected by the freeholders of the county, as the coroners are at this day, and consequently that their office did not determine by the death of the king.

2 Brownl. 282. but Q. [(a) It was ordained by the statute of 28 E. 1. c. 8. that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For, anciently, in some counties the sheriffs were hereditary; as it seems they were in Scotland till the statute of 20 G. 2. c. 43. and still continue in the county of Westmoreland, of which the Earl of Thanet is the hereditary sheriff. The city of London too have the inheritance of the shrievalty of Middlesex vested in their body by charter, 1 Bl. Comm. 339. This office may also descend to, and be executed by a female; for Anne Countess of Pembroke had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench. Hargr. Co. Litt. 326.]

(b) Dav. 60. And though at this day the king hath the sole appointment of (c) 4 Co. 33. sheriffs (b), except in counties palatine, and where there are a Mitton's case. *jura regalia*, yet it hath been (c) adjudged, that the office of sheriff is an entire thing, and that therefore the king cannot apportion or divide it, that is, he cannot determine it in part, as for one town or one hundred; neither can he abridge the sheriff of any thing incident or belonging to his office.

## (B) Who are qualified or exempt from serving.

(d) 9 Ed. 2. stat. 2. It is provided by several (d) acts of parliament, that no man shall be sheriff in any county, except he have sufficient lands within the same county where he shall be sheriff, whereof to answer the king and his people in case that any person shall complain against him; and that none that is steward or bailiff to a great lord shall be made sheriff.

2 Ed. 3. c. 4. It is holden, that the king hath an interest in every subject, and a right to his service, and that no man can be exempt from the office of sheriff, but by act of parliament or letters patent.

4 Ed. 3. c. 9. And on this foundation it was adjudged in Sir John Read's case, who was made high-sheriff of Herefordshire at the time he was excommunicated for non-payment of alimony, that an information properly lay against him for not executing the office; 5 Ed. 3. c. 4. stat. 1. c. 7. that he

Sav. 43.  
2 Co. 46.

2 Mod 299.  
Attorney-General v.  
Sir John Read.

though it was objected on his behalf, that the oath and sacrament enjoined by act of parliament are necessary qualifications for all sheriffs, which he was disabled to take by reason of the excommunication; but the court held that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication, and that therefore it could be no excuse.

And though in the above case it was admitted, that the subject was bound to serve the king in such capacity as he is in at the time of the service commanded, yet it was insisted upon, that he was not obliged to qualify himself to serve in every capacity; and that therefore a prisoner for debt is not bound or compellable to be sheriff, no more than a person is bound to purchase lands to qualify himself to be either a coroner or justice of the peace. It was likewise said, that by the statute 3 Jac. 1. cap. 5. every recusant is disabled; and though he may conform, he is not bound to it; for if he submits to the penalty, it is as much as is required by law.

An information was exhibited against *L.* for refusing to take upon him the office of sheriff of *Norwich*, who pleaded the statute 13 Car. 2. st. 2. c. 1. § 12. \*, by which it is enacted, that a person elected to any office in a corporation, shall be such as within one year before hath taken the sacrament according to the church of *England*, else the election shall be void; and averred that he had not taken the sacrament, &c. at any time within the election of him to be sheriff, &c., wherefore the election was void. The Attorney-General replied, and set forth that part of the act of uniformity, by which every person is obliged to take the sacrament three times in the year, according to the Liturgy, &c.; the defendant rejoined, and set forth the statute of 1 W. & M. c. 18. for tolerating dissenters; and on demurrer it was adjudged, that the defendant's rejoinder was a departure from his plea, and therefore he could have no advantage of the act of toleration, supposing it was for his purpose, it being a private statute (a), and therefore to be pleaded. And though judgment was given principally on this point, yet all the court, except Justice *Sam. Eyre* (b), held, that this case was not within the meaning of the toleration act, which was not made in favour of dissenters, but the contrary, and was rather to exclude them from beneficial offices, than to ease them of offices of charge.

[Four years before, *M. 2 W. & M.*, this was adjudged as a good plea, in the case of *Guildford Town v. Clarke*, viz. that he being a dissenter, and unqualified by the act, the election was void; and that the bye-law for forfeiting 20*l.* upon refusal after election did not take place, because the person being absolutely incapacitated by the statute, there was really no election; and so he could not refuse after election.

The defendant was one of the dissenters who was chosen sheriff of *London* and *Middlesex*, and refused to take upon him the office; for which an information was moved against him, as it is an office in which the publick are interested, and therefore

2 Mod. 301.

Carth. 306.  
Salk. 167.  
pl. 1.  
Ld. Raym.  
29. Skin.  
574. pl. 1.  
4 Mod. 269.  
The King  
and Queen  
v. Larwood.  
\* See now  
5 G. 1. c. 6.  
f. 3. &  
11 G. 1.  
c. 4. f. 6.  
[(a) It is  
now declared  
to be a  
publick act  
by 19 G. 3.  
c. 44.  
(b) It was  
said at the  
bar that the  
Lord Keeper  
was of the  
same opinion  
with Mr. J.  
Eyre.]

2 Vent. 247.  
Gibb. 506.

Rex v.  
Grosvenor,  
2 Str. 1193.

not to be compensated by a pecuniary satisfaction to the city. But, upon shewing cause, the court discharged the rule: it appearing there were acts of common council that had provided penalties upon refusers, which is the proper remedy; especially where it is doubtful, whether the refusal is a crime or not, which hath never yet been settled. In this case, the facts are agreed, and the only doubt is in point of law, and therefore more proper for a civil suit: and so was the opinion of the court, in the case of *Shackleton of York*, in Lord *Hardwicke's* time. However, they declared, that if, after the point was determined against the dissenters, others should refuse; it might be a foundation to move for an information.

Harrison v.  
Evans,  
2 Burn's  
E. L. 185.  
6 Br. P. C.  
181.

But this much agitated question, concerning the fining of dissenters for not serving corporation offices, is now settled.—In the year 1748, the corporation of *London* made a bye-law, imposing a fine of 600 *l.* upon every person, who, being elected, should refuse to serve the office of sheriff. An action was brought in the sheriff's court upon this bye-law, for the penalty of 600 *l.* against the defendant *Allen Evans*, for refusing to serve the said office. The defendant pleaded the statute of 13 *Car. 2. c. 1.* that no person shall be chosen into such office, who shall not, within one year next before, have taken the sacrament according to the rites of the church of *England*; and in default thereof, every such choice is declared to be void. The defendant further pleaded the statute of 1 *W. & M. c. 18.* for exempting protestant dissenters from penalties contained in former acts. Then the plea averred, that the sheriffs of *London* are officers who before 13 *Car. 2.* were persons bearing such office; that the defendant was and still is a protestant dissenter from the church of *England*, a person of a scrupulous conscience in the exercise of religion, and during all that time has and still does frequent the congregation of religious worship among protestant dissenters. The defendant then stated that he took the oaths, and subscribed the declaration, according to the act of toleration, in the year 1751, at the sessions holden for the county of *Middlesex*; and that his taking the oaths was duly registered in the court of sessions: that he had not within one year before the supposed election taken the sacrament of the Lord's Supper according to the rites of the church of *England*, nor as he at any time since done it, nor was he bound to take the same since *May 1751*: that of these premises the lord mayor, aldermen, and citizens had notice; and that by reason thereof, and of the act of parliament made for governing corporations, the mayor, aldermen, and citizens assembled in *July 1754*, and the livery were prohibited from electing, and had no power to elect him sheriff: that he was disabled from, and incapable of being elected, and that the supposed election of him was void. To this plea the plaintiff replied, that by the statute of 5 *Geo. 2. c. 6. § 3.* it is enacted, that no person chosen into such office shall be removed or otherwise prosecuted for omission of taking the sacrament, nor shall any incapacity or disability be incurred by reason of the same (unless he be removed or prosecution commenced

within

within six months). To this replication the defendant demurred; and the plaintiff joined in demurrer. And judgment was given for the plaintiff in the sheriff's court; which was afterwards affirmed in the court of the hustings. But this judgment was reversed by the commissioners delegates, viz. Lord Chief Baron Parker, Mr. Justice Foster, Mr. Justice Bathurst, and Mr. Justice Wilmot; and the judgment of the commissioners delegates was afterwards affirmed in the House of Lords. The House, when the matter was brought before them, ordered this question to be proposed for the opinion of the judges, How far the defendant might, in the present case, be allowed to plead his disability in bar of the accusation brought against him? It was allowed on all hands, that if his non-conformity and consequent disability, was criminal, he could not plead it. And for this reason one of the judges, *Perrot* B., was of opinion (contrary to the rest of his brethren), that the defendant's disability, in the present case, could not be pleaded, because, as he said, the toleration act amounted to nothing more than an exemption of protestant dissenters from the penalties of certain laws therein particularly mentioned; and the corporation act not being mentioned therein, the toleration act could have no influence upon it; and therefore his disability, incurred by his non-conformity in consequence of the corporation act, was, in his opinion, a culpable one, and rendered him liable to any penalties, to which any others are liable for refusing to serve the office of sheriff; inasmuch as no man can disable himself; but, if he refused to take the sacrament according to the rites of the church of *England*, he disabled himself, and the fine imposed was a punishment upon him for the crime of his non-conformity, from which he could plead no legal exemption.—But all the other judges were of a contrary opinion, That the corporation act expressly rendered the dissenters ineligible and incapable of serving; its design being to keep them out, as persons at that time supposed to be disaffected to the government; and though the disability arising from hence could not *then* have been pleaded against such an action as is now brought against the defendant, non-conformity being *then* in the eye of the law a crime, and no man being allowed to excuse one crime by another; yet the case is different since the toleration act was enacted, that act amounting to much more than a mere exemption from the penalties of certain laws, and having an influence upon the corporation act consequentially, though the corporation act is not mentioned therein, by freeing the dissenters from all obligation to take the sacrament at church, abolishing the crime as well as penalties of non-conformity, and allowing and protecting the dissenting worship. The defendant's disability, therefore, they said, was a lawful one, a legal and reasonable, not a criminal excuse; it was not in the sense of the law disabling himself; the meaning of that maxim, "That a man shall not disable himself," being only this, that no man shall disable himself by his own wilful fault or crime; and non-conformity being no longer a crime since the toleration act was enacted, he is disabled by judgment of parliament, namely, by

Furneaux's  
Letters to  
Blackstone.

the

the corporation act, without the concurrence or intervention of any crime of his own; and therefore he may plead this disability in bar of the present action.] —

Salk. 168.

4 Mod. 273.

If a man is disabled by a judgment in law to bear an office, he is excused, *nam judicium redditur in invitum*; for though his fault or neglect was the occasion of such judgment, yet it is a mark set upon him by the government.

Salk. 142.

pl. 1.

Ld. Raym.

496.

Carth. 480.

5 Mod. 438.

12 Mod.

270.

City of London v. Vanacre.

And as nothing but an invincible necessity can exempt a person from serving the office of sheriff, on this foundation a bye-law made in London, that no freeman chosen sheriff, &c. shall be excused, unless he voluntarily swears he is not worth 10,000*l.* &c., and if he openly refuse to take the office, then to forfeit the sum of 400*l.* &c., was adjudged good.

Rex v.

Woodrow,

2 Term Rep.

731.

[By the 9 Geo. 2. c. 9. § 3. any person elected sheriff of *Norwich* worth 3000*l.* may be excused serving the office on paying a fine of 80*l.* within fourteen days: but the fourth section provides, that no person shall be discharged from bearing the said office for any longer time than one year, without the consent of the mayor, sheriffs, and commonalty of the city. The defendant, who was worth 3000*l.*, had been regularly elected to the office, and had tendered his fine, on condition that he should be discharged from serving the office in future; but this was not accepted. On a motion for an information against him, the court were clearly of opinion, that the payment of the fine did not exempt the person paying it for more than a year, without the agreement of the corporation that he should be discharged for a longer time. And they granted an information against the defendant, because the vacancy of the office occasioned a stop of publick justice, and the year would be nearly expired before an indictment could be brought to trial.]

### (C) Manner of appointing him; and herein, of his Oath.

Dalt. Sh. 7.

Where see

the form of

such patents.

(a) As the

sheriff is

made by let-

ters patent of

record, if there-

fore it shall come

in question, whether

he be sheriff or not,

it is to be

tried by the

record, or it may

be tried by the

examination of

the sheriff. Dalt.

Sh. 8. 9 Co. 31.

Jenk. 90. —

For the fees of his patent, *vide* 3 G. 1. c. 15.

Dalt. Sh. 6.

(b) But it

may be put

off to an-

other day.

Cro. Car. 13.

595.

\*By 24 G. 2.

By the statute of 9 E. 1. 2. the chancellor, treasurer, and judges are to meet (b) *Croftino Animarum*, being the 3d of November\*, every year, in the Exchequer chamber, to nominate persons to be made sheriffs. And the manner is, the Lord Chancellor, treasurer, and other high officers, being of the privy council, together with the judges of both benches and the barons of the

Exchequer,



Exchequer, being assembled in the Exchequer-chamber, nominate three persons in every county to be presented to the king, that he may prick one of them to be sheriff of every county.

c. 43. § 12.  
Sheriffs are  
to be ap-  
pointed on  
the morrow of St. Martin.

And yet the king by his prerogative may make and appoint the sheriffs without this usual assembly, and election or nomination in the Exchequer, as is the daily practice at this day upon the death of any sheriff.

Dyer, 225.  
Dalt. Sh. 6.  
[Vide 1 Bl.  
Comm. 341.  
and Mr. Christian's note.]

The sheriffs in every of the shires of *Wales* shall be nominated yearly by the Lord President, council, and justices of *Wales*, and shall be certified up by them, and after appointed and elected by the king as other sheriffs are.

34 H. 8.  
c. 26.  
Dalt. Sh. 6.  
[By stat. 1  
W. & M.  
c. 27. § 4.

the nomination of three proper persons to be sheriffs of the Welch counties is now vested in the justices of the great sessions, who are to certify the names of such persons to the privy council *crassino animarum*, that the king may appoint out of them.]

The sheriff, before he doth exercise any part of his office, and before his patent is made out, is to give security in the King's Remembrancer's office in the Exchequer, under pain of 100 l. for the payment of his proffers, and all other profits of his sheriffwick. But these securities are never sued, unless there is a deficiency in the sheriff's effects.

Dalt. Sh. 7.

The sheriff, before he takes upon him the exercise of his office, must not only take the oaths of allegiance and abjuration in-joined all officers by divers acts of parliament, but likewise a particular oath of office, which is (a) said to be by the ancient common law, and contains a concise account of the nature and several branches of his office. This ancient oath is set down in *Dalton*, 9.

Dalt. Sh. 9.

(a) Dyer,  
163.

But there being in this oath some things which were thought too (b) strict with respect to sheriffs, instead thereof it is now enacted by the 3 Geo. 1. c. 15. § 18. that the following oath shall be taken by all high sheriffs, except the sheriffs of *Wales* and of the county palatine of *Chester* (c), &c. viz. " I A. B. do swear that I " will well and truly serve the king's majesty in the office of sheriff " in the county of \_\_\_\_\_ and promote his majesty's profit " in all things that belong to my office as far as I legally can or " may. I will truly preserve the king's rights and all that belong- " eth to the crown. I will not assent to decrease, lessen, or con- " ceal the king's rights, or the rights of his franchises; and " wheresoever I shall have knowledge that the rights of the " crown are concealed or withdrawn, be it in lands, rents, fran- " chises, suits, or services, or in any other matter or thing, I will " do my utmost to make them be restored to the crown again; " and, if I may not do it myself, I will certify and inform the " king thereof, or some of his judges. I will not respite or de- " lay to levy the king's debts for any gift, promise, reward, or " favour, where I may raise the same without great grievance to " the debtors. I will do right as well to poor as to rich, in all " things belonging to my office. I will do no wrong to any " man for any gift, reward, or promise, nor for favour or hatred. " I will disturb no man's right, and will truly and faithfully ac-

(b) Vide Cro.  
Car. 26.  
Several ex-  
ceptions  
taken by my  
Lord Coke  
to the addi-  
tions made  
to the an-  
cient oath,  
and annexed  
to the *dedi-  
mus* to swear  
him sheriff  
of Bucks.  
[(c) The  
sheriffs of  
those places  
are to take  
the old oath,  
with the  
omission  
only of the  
words im-  
posing con-  
stant resi-  
dence in  
their baili-  
wicks.  
3 Geo. 1.  
c. 1. § 20.]

“ quit at the Exchequer all those of whom I shall receive any  
 “ debts or duties belonging to the crown. I will take nothing  
 “ whereby the king may lose, or whereby his right may be dis-  
 “ turbed, injured, or delayed. I will truly return, and truly serve  
 “ all the king’s writs according to the best of my skill and know-  
 “ ledge. I will take no bailiffs into my service but such as I will  
 “ answer for, and will cause each of them to take such oaths as  
 “ I do in what belongeth to their business and occupation. I will  
 “ truly set and return reasonable and due issues of them that be  
 “ within my bailiwick, according to their estate and circum-  
 “ stances, and make due panels of persons able and sufficient,  
 “ and not suspected or procured, as is appointed by the statutes  
 “ of this realm. I have not sold or let to farm nor con-  
 “ tracted for, nor have I granted or promised for reward or be-  
 “ nefit, nor will I sell or let to farm, nor contract for or grant for  
 “ reward or benefit by myself or any other person for me, or for  
 “ my use, directly or indirectly, my sheriffwick or any bailiwick  
 “ thereof, or any office belonging thereunto, or the profits of the  
 “ same, to any person or persons whatsoever. I will truly and di-  
 “ ligently execute the good laws and statutes of this realm, and  
 “ in all things well and truly behave myself in my office for the  
 “ honour of the king and the good of his subjects, and discharge  
 “ the same according to the best of my skill and power. So help  
 “ me God.”

Dalt. Sh. 15.  
 Dyer, 167.

If a person refused to take upon him the office of sheriff, it was usual to punish him in the Star-chamber; and he may now be proceeded against by information in the court of King’s Bench. Also, if he refuses to take the oaths enjoined him, or officiates in the office before he hath thus qualified himself, that court, which hath a general superintendancy over all officers and ministers of justice, will grant an information against him. And it hath been (a) held, that a refusal of oaths enjoined to be taken, amounts to a refusal of the office.

(a) 3 Lev.  
 116.  
 Carth. 307.

Dalt. Sh. 13,  
 14.

If the sheriff be not in *London*, the oath may be taken by *dedimus potestatem*, directed to any two justices of the peace of the same county, one to be of the *quorum*, or to any other commissioner or commissioners, or before one of the judges of assize for that county, or one of the Masters in Chancery, who, it is said, may as well as the judge administer such oath without any *dedimus*.

Dyer, 168.  
 Dalt. Sh. 14.

If the commissioners shall return the commission or writ, and the oaths to be taken when they were not taken, this is finable.

11 Co. 98.

It is held, that the breach or violation of this oath, although an high offence, is not however perjury, nor punishable as such.

(D) That he must attend to this Office singly, and cannot execute any other.

4 Inst. 48.  
 Lit. Rep.  
 726. Sir  
 Simon Dene’s Jour. 38. 436.

IT is holden, that a sheriff cannot be elected *knight* of the shire for that county for which he is sheriff.

And although a sheriff is by virtue of his office a conservator of the peace, yet it is enacted by the 1 Mar. st. 2. c. 8. § 2.

"That no person having the office of sheriff of any county shall exercise the office of justice of the peace in any county where he shall be sheriff during the time he shall use the office of sheriff."

By the 1 H. 5. c. 4. it is enacted, "That no under-sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in any of the king's courts during the time that he is in office."

(E) How long to continue in his Office, and by what determined.

BY the 14 E. 3. c. 7. it is enacted, "That no sheriff (a), under-sheriff, nor sheriff's clerk, shall tarry or abide in his office above one year, upon pain to forfeit two hundred pounds yearly as long as he occupieth the office; and that every pardon made for such offence or forfeiture shall be void; and all (b) letters patent made to occupy such office above one year shall be void, any words or clause of *non obstante* put into such patent notwithstanding; and that whosoever shall presume to take upon himself the office of a sheriff above one year by force of such letters patent, shall be disabled from ever after to be sheriff within any county of England."

the clause of *non obstante*, might make a good patent of such office for life; and by the following authorities, which seem to be grounded on this resolution, it is said, that the king by his prerogative may dispense with these statutes, and grant the office of sheriff for years, life, or in fee. 7 Co. 14. Finch of Law, 234. Plow. 502. Dalt. Sh. 22. But yet vide 2 Hawk. P. C. c. 37. where the contrary opinion is holden, and the reason of these authorities refuted, and stat. 1 W. & M. sess. 2. c. 2.

By the 1 Ric. 2. c. 11. it is enacted, "That none that hath been sheriff of any county a year shall be within two years next chosen again, or put in the same office, if there be other sufficient."

And by the 1 Hen. 5. c. 4. it is enacted, "That they that be bailiffs of sheriffs one year shall be in no such office by three years next following, except bailiffs of sheriffs which inherit in their office."

By the common law the patents of sheriffs, like all other commissions, determined by the death or demise of the king; but now by the 7 W. & M. c. 27. § 21. and 1 Ann. st. 1. c. 8. such commission shall remain in full force for the space of six months next after such death or demise, unless superseded, determined, or made void by the next successor.

But though such patent was determined by the death of the king, yet it was adjudged, that if the sheriff after such demise, and before his taking out a new patent, suffered a prisoner to escape, that an action lay against him.

It hath been held, that the office of sheriff does not determine by the party's becoming a peer on the death of his father, but that he still remains sheriff *ad voluntatem regis*.

(F) That he must be resident in his County, and whether he hath any Jurisdiction out of it.

(a) The word in the original is *demurrant*, which it is said is not

BY the 4 *H. 4. c. 5.* it is enacted, " That every sheriff shall " be (a) dwelling in proper person within his bailiwick for " the time he shall be such officer, and that the sheriff shall be " (b) sworn to do the same."

well translated by the word *dwelling*. Lit. Rep. 328. (b) Is now left out of the new oath.

Dalt. Sh. 22.

(c) 9 *H. 4. 1.*  
[He may assign a bail-bond out of his county.

2 *Ld. Raym.*

1455. 2 Str. 757.]

Hence it is clear that a sheriff hath no jurisdiction in any other county, nor can he do a judicial act, in which his personal presence is required out of his county. But it is held, that he may do a (c) ministerial act, as make a panel, or return a writ out of his county.

Dalt. Sh. 22.

But, if the sheriff be beyond sea, and make a panel or any return there, and send it into *England*, it is not good, for he is an officer but only in *England*.

Dalt. Sh. 23.

If on a *habeas corpus*, &c. the sheriff is commanded to carry a prisoner to a certain place out of his county, and in doing this he is obliged to go through several counties, to this special purpose he hath authority in these other counties.

Plow. 37.

Dalt. Sh. 23.

So, if a prisoner of his own wrong shall make an escape, and fly into another county, the sheriff or his officers upon fresh suit may take him again in another county.

### (G) Cannot dispose of his Bailiwick.

BY the 23 *H. 6. c. 10.* it is provided, " That no sheriff shall let " to farm in any manner his county, nor any of his baili- " wicks, hundreds, or wapentakes."

3 *Keb.* 678.  
*Ellis v.*  
*Nelson.*

In the construction hereof it hath been holden, that this is a particular law, and must be pleaded, otherwise, the judges cannot take notice of it.

20 *H.* 7. 13.

Dalt. Sh. 23.

It hath been holden, that a lease thereof, though no rent was ever reserved, is within the statute, the intent thereof being that sheriffs should keep their counties in their own hands.

Plow. 87.

Dalt. Sh. 23.

It seems the better opinion, that a lease, reserving only part of the profits, is within the statute.

Dalt. Sh. 24.

It hath been doubted, whether a lease made by the sheriff of his office or county only by parol be within the statute.

*Moor*, 781.  
*Stockwith*  
*v. North.*

*Wide title*  
*Office.*

It hath been adjudged in the case of the sheriff of *Nottingham*, who took money for his bailiwick, which he first gave his servants, and which they sold, but he himself received the money, that this was within the statute 4 *H. 4. c. 5.* which prohibits the letting to farm, &c. under certain penalties; and that it was not only *malum prohibitum*, but likewise *malum in se*, as tending to extortion and other oppressions.

By

By the 3 Geo. 1. c. 15. § 10. "It shall not be lawful for any person to buy, sell, let, or take to farm the office of under-sheriff or deputy-sheriff, seal-keeper, county-clerk, shire-clerk, gaoler, bailiff, or any other office pertaining to the office of high sheriff, or to contract for any of the said offices, on forfeiture of 500 l., one moiety to his Majesty, the other to such as shall sue in any court at *Westminster* within two years after the offence.

"Provided that nothing in this act shall hinder any high sheriff from constituting an under-sheriff or deputy-sheriff, as by law he may, nor hinder the under-sheriff in case of the high sheriff's death, when he acts as high sheriff, from constituting a deputy, nor hinder such sheriff or under-sheriff from receiving the lawful fees of his office, or from taking security for the due answering the same, nor hinder such under-sheriff, deputy-sheriff, seal-keeper, &c. from accounting to the high sheriff for all such lawful fees as shall be by them taken, nor for giving security so to do, nor to hinder the high sheriff from allowing a salary to his under-sheriff, &c. or other officers \*."

\* If a sheriff takes bond of his bailiff to pay 20 d. for every defendant's name in every warrant in *mesne process*, it is not letting his sheriff-*wick to farm*.  
Ballantine v. Irwin.

M. 4 G. 2. C. B. Fort. 563.

(H) Of the High Sheriff's Power and Duty in appointing an Under-Sheriff, and other Deputies :  
And herein,

# 1. Of the Under-Sheriff, and in what Manner appointed.

ALTHOUGH the king by his letters patent granteth to the sheriff *custodiam comitatus*, without any express words to make a deputy, yet hath the sheriff power to make a deputy or under-sheriff, who may execute all the ministerial parts of the office. For experience, says my Lord *Hobart*, proves, that many sheriffs cannot execute it themselves. From the (a) antiquity thereof and necessity of this officer the law takes notice of him, and on his being appointed, the law implicitly gives him power to execute all the ordinary offices of the sheriff himself, that can be transferred by law.

*vicecomes*; and in the statute 11 H. 7. c. 15. Shire Clerk. 4 Co. Mitton's case. Dyer, 355.

Dalt. 3, 514.  
Hob. 13.  
(a) Was formerly called *senescallus vicecomitis*,  
Dalt. Sh. 3.  
—And in the statute Westm. 2. 13 Ed. 1. stat. 1. c. 39. he is called *sub-*  
9 Co. 49.

He is, says my Lord *Hobart*, in nature of a general bailiff to the sheriff over the whole shire, as others are over the hundred; and being in effect but the sheriff's deputy, according to the nature of a deputation, he is removable as an attorney is; and though made irrevocable, yet may the high sheriff remove him. But having once appointed him, though he may totally remove him, yet he cannot (b) abridge him of any part of his power.

The high sheriff may execute the office himself, and the under-sheriff hath not, nor ought to have, any estate or interest in the office itself; neither may he do any thing in his (c) own name, but

Hob. 13.  
(b) 2 Brown 281.  
Dalt. Sh. 3.  
(c) An under-sheriff must act in

the name of but only in the name of the high sheriff, who is answerable for the high him.  
 sheriff, be-  
 cause the writs are directed to the high sheriff. Salk. 96.

By the 3 *Geo. 1. c. 15. § 8.* it is enacted, "That if any sheriff shall die before the expiration of his year, or before he be superseded, the under-sheriff shall nevertheless continue in his office, and execute the same in the name of the deceased till another sheriff be appointed and sworn; and the under-sheriff shall be answerable for the execution of the office during such interval, as the high sheriff would have been; and the security given by the under-sheriff and his pledges shall stand a security to the king, and all persons whatsoever, for the due performing his office during such interval."

(a) That before this statute the under-sheriff was never

The under-sheriff, before he intermeddle with the office, is to be sworn; this is enjoined (a) by the statute 27 *Eliz. cap. 12.* and the form of the oath there prescribed.

sworn. Roll. Rep. 274. Per Coke.

And now by the 3 *Geo. 1. c. 15. § 19.* it is enacted, That all under-sheriffs of any counties in *South Britain*, except the counties in *Wales* and county palatine of *Chester*, before they enter upon their offices, shall take the following oath, viz. "I *A. B.* do swear, that I will well and truly serve the king's majesty in the office of under-sheriff of the county of ——— and promote his majesty's profit in all things that belong to the said office as far as I legally can or may, and will preserve the king's rights and all that belongeth to the crown. I will not assent to decrease, lessen or conceal the king's rights, or the rights of his franchises; and whensoever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchises, suits or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again; and if I may not do it of myself I will certify and inform some of his majesty's judges thereof, and will not respite or delay to levy the king's debts for any gift, promise, reward, or favour, where I may raise the same without great grievance to the debtors. I will do right as well to poor as to rich, in all things belonging to my office. I will do no wrong to any man for any gift, reward, or promise, nor for favour or hatred. I will disturb no man's right, and will truly and faithfully acquit at the Exchequer all those of whom I shall receive any debts, duties, or sums of money belonging to the crown. I will take nothing whereby the king may lose, or whereby his right may be disturbed, injured, or delayed. I will truly return, and truly serve all the king's writs to the best of my skill and knowledge. I will truly set and return reasonable and due issues of them that be within my bailiwick, according to their estates and circumstances, and make due panels of persons able and sufficient, and not suspected or procured, as is appointed by the statutes of this realm. I have not bought, purchased, or taken

“ to farm or contracted for, nor have I promised or given any  
 “ consideration, nor will I buy, purchase, or take to farm, or con-  
 “ tract for, promise, or give any consideration whatsoever by my-  
 “ self or any other person for me, or for my use, directly or in-  
 “ directly, to any person or persons whatsoever, for the office of  
 “ under-sheriff of the county of ————— which I am now to  
 “ enter upon and enjoy, nor for the profits of the same, nor for  
 “ any bailiwick thereof, or any other place or office belonging  
 “ thereunto. I have not sold or contracted for, or let to farm,  
 “ nor have I granted or promised for reward or benefit by my-  
 “ self, or any other person for me, or for my use, directly or  
 “ indirectly, any bailiwick thereof, or any other place or office  
 “ belonging thereunto. I will truly and diligently execute the  
 “ good laws and statutes of this realm, and in all things well  
 “ and truly behave myself in the said office for his majesty’s ad-  
 “ vantage and for the good of his subjects, and discharge my  
 “ whole duty according to the best of my skill and power. So  
 “ help me God.”

Which oath is to be administered by such commissioners as shall be named to administer the oath to the high sheriff, as often as a commission of *dedimus* shall be sued forth for that purpose, or by the barons, or one of them, when the sheriff desires to be sworn in town.

[The sheriff cannot depute two persons, under-sheriffs extraordinary, to take an inquest.

Denny v.  
 Trapnell,  
 2 Will. 378.

Although service of a rule on the under-sheriff’s *agent* in town is not good service, yet service at the offices of the *agents* for the under-sheriff of *London, Middlesex, and Surry*, is, because they are considered as the offices of the under-sheriffs.]

Rex v.  
 Coles,  
 Dougl. 420.

## 2. Of Covenants between the High Sheriff, his Under-Sheriff, and other Officers.

It is meet and safe, says *Dalton*, for the high sheriff to take good security from his under-sheriff and other officers before he trust them with their offices; and for this commonly the high sheriff taketh bonds and covenants from the under-sheriff and friends, as also of his bailiffs and gaoler.

Dalt. Sh.  
 445.  
 2 Keb. 352.

And as this is allowed by law, it is holden, that if an under-sheriff covenants with the high sheriff to discharge and save him harmless from all escapes of prisoners arrested by the under-sheriff, or any by him appointed, this is a good covenant; for since the high sheriff transfers his authority, it is but reasonable he should take security for the faithful execution of it; and there is nothing intended against law, but rather to prevent than connive at escapes.

Hob. 12, 13.  
 Moor, 856.  
 Godb. 212.  
 Brownl. 65.

But, if the high sheriff makes *J. S.* his under-sheriff, and takes a bond or covenant from him that he will not serve executions above 20*l.* without his special warrant, this is a void covenant, because it is against law and justice, inasmuch as when he is

Hob. 12, 13.  
 Godb. 212.  
 2 Brownl.  
 281.  
 Sir Daniel  
 Norton v.  
 Sim.

made under-sheriff, he is liable by the law to execute all process as well as the sheriff is.

Hob. 14. But it was resolved in the above case, that though this covenant was void in law, that yet the bond was good for the rest of the covenants which were agreeable to law; and a difference was taken between a bond made void by statute and by common law; for upon the statute of 23 H. 6. cap. 9. if a sheriff will take a bond for a point against that law, and also for a due debt, the whole bond is void, for the letter of the statute is so; for a statute is a strict law; but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand.

Hob. 13. Also, it was resolved, that this case was not within the statute 23 H. 6. c. 9. because it was not a bond made by or on the behalf of a prisoner, and because the statute is not pleaded, as it ought to be, being a special law (a).

[2 Will. 351.]  
Moor, 242. So, in debt upon an obligation entered into by the sheriff's clerk, or under-sheriff, for payment of money into the Exchequer within 14 days after he received it, who pleaded the statute 23 H. 6. c. 9. and averred that it was taken *colore officii*; it was adjudged upon demurrer, that the statute extended only to bonds taken from those who were to appear, or who were in ward, and not to this case.

Stil. 16. In debt on an obligation by the under-sheriff to the high sheriff for saving him harmless, the defendant pleaded, that he had saved him harmless; which on demurrer was held an ill plea, because he might have saved him harmless in some things though not in all, and therefore *non damnificatus* had been the proper plea.

Stil. 18. In debt by an under-sheriff against his bailiff on an obligation to save him harmless in the executing of process and other things contained in the condition, it was objected, that it was not alleged that the process was to be executed within the hundred wherein he had jurisdiction: and this the court held a good objection, because the bailiff cannot execute a process out of the hundred wherein he is bailiff, by virtue of his general authority, but only as a special bailiff.

Stoughton v. Day. Allen, 10. though words of the condition were general to make return of all warrants directed to him, yet it was to be understood of such only as were to be executed within the hundred of which he was made bailiff. 2 Saund. 414. S. C. cited.

Sid. 30. Debt on a bond to perform covenants, which was, that the defendant should not let at large any prisoner arrested without the sheriff's warrant: the plaintiff shews the defendant had let such a prisoner at large at *Westminster*, &c. it is good without shewing the time and place of the arrest, for the escape is the material part of the covenant, and the manner of the arrest is not in question; and whether he were legally taken or imprisoned, was not material when he was suffered to go at large.

H. 26 & 27 Car. 2. In B. R. Lewin v. In debt on an obligation conditioned to perform the covenants and agreements in an indenture made between the sheriff of *Essex* and the under-sheriff, in which the under-sheriff covenanted to pay all



all fums of money which ought to be paid by the sheriff touching the execution of the said office, and to discharge the sheriff of them: defendant pleads performance generally; plaintiff in his replication assigns a breach in non-payment of 40 *l.* to the gaoler of *Chelmsford*, expended *pro materia tangent' execut' offic' predict'*, viz. for the conducting of a prisoner from *Chelmsford* to *York* castle, and for his meat and drink in the journey, which sum the gaoler hath recovered against the sheriff. Defendant rejoins, that the recovery was for a particular matter between them, and not for matter touching his office, and concludes to the country; upon which the plaintiff demurs. It was urged for the plaintiff, and agreed to by *Will*, Justice, that the defendant ought not to have concluded his rejoinder to the country, but to have left it to the plaintiff to answer to. *Per cur.* There is no good breach assigned; for the recovery within this covenant ought to be for such matter as concerns the sheriff, to which by law he is compellable. The recovery against the sheriff was in an *assumpsit*. It does not appear that the sheriff was obliged to bring him to *York*. It does not appear that there was any *habeas corpus*; and the sheriff cannot deliver his prisoner to another sheriff without an *habeas corpus*, upon the back of which he writes his charges, which are allowed by the judges of assize; and this shall be allowed to him upon his account in the Exchequer, if the prisoner was carried into another county; but if it was in the same county, he shall not have allowance for his charges. As to that which is assigned, that part became due for finding meat and drink for the prisoner; this is no breach; for before the party is convicted he ought to live at his own charges, and therefore till conviction hath his goods, but after conviction at the charge of the king; and therefore the sheriff shall have allowance in the Exchequer. At the plaintiff's request the court permitted him to discontinue, paying the defendant all his costs without process.

Alfop.  
3 Keb. 448.  
S. C.

### 3. Of Acts that may be done by either of them, or where the High Sheriff must himself be personally present.

As it is impossible the high sheriff can himself personally execute every branch and thing belonging to his office, and as the law, from the necessity of the thing, and in furtherance of justice, allows him to make a deputy, hence it is necessary that such deputy should in all things, in which the high sheriff's personal presence is not required, have the same power with the sheriff himself; and as by the nomination of him, the sheriff implicitly confers on him a power of doing all such offices as he himself could execute, and may be transferred by the law, it is likewise held, that the deputy's authority is by law so equal with the principal's, that any condition, covenant, or other bargain to restrain it, is void; and therefore it is now universally agreed, that the under-sheriff may make bills of sale upon executions, assign bail-bonds\*,

Hob. 12, 13.  
Salk. 95.  
Ld Raym.  
638.  
Com. Rep.  
84. pl. 52.  
See 12 Mod.  
467. 470.  
690.

\* The under-sheriff himself may assign a bail-bond in the name of the high sheriff, since stat. 4 & 5 Ann. c. 16., but

make

the under-sheriff's clerk may make return to writs, and in general do every thing that the sheriff himself can do.

not. *Kitfon v. Fagg*, 1 *Str.* 60. [But this case was denied to be law by Lord Mansfield, in the case of *Harris v. Ashley*, Sittings in Middlesex, Mich. Term 30 G. 2. where the assignment was under the seal of office, and was made by the under-sheriff's clerk, in his office, and that appeared to be the usual practice of making such assignment; and in *French v. Arnold*, 1 *Tr.* 5 G. 3. this case of *Harris v. Ashley* being mentioned, Lord Mansfield said, he had mentioned it before he had determined it, to Mr. J. Dennison, and afterwards to the other judges of the court, and they concurred with him in opinion that the bond was well assigned. 1 *Str.* 60. Nolan's edition, notes.]

Dalt. Sh. 103. Upon any writ or process delivered to the under-sheriff, he, as well as the high sheriff, may direct his bailiff or other officer to arrest or otherwise to execute such process; but such bailiff or other officer must serve or execute it himself, for he cannot command any other to do it either by word or writing.

Dalt. Sh. 104. So, the under-sheriff, bailiff, or other such officer, may, if need be, take the *posse comitatús*, that is, what number of other persons they shall think good, to execute any writ, process, or other lawful warrant to them directed, and such as shall not assist them therein, being required, shall make fine to the king.

Cases in B. R. 454. And as the under-sheriff is principally active in the execution of the office, so the courts have refused to grant an attachment against the high sheriff where the under-sheriff refuses to return a writ, but will grant an attachment against such under-sheriff, and by a (a) rule oblige the high sheriff to return such attachment against the under-sheriff. But the usual course is to direct the attachment to the coroners.

(a) *Gravelly v. Ford*,  
H. 5 Ann.  
in B. R.  
Cro. Eliz.  
294.  
*Levett v. Farrar*.

A writ upon the statute of *Northampton* was awarded to the sheriff and justices of peace of the county of *Norfolk* to remove a force; the under-sheriff by command of the high sheriff executed the writ, and by virtue thereof arrested J. S. and it was held, that the execution of the writ by the under-sheriff was good, especially as it named him only by the name of his office, and not by his proper name, and as it did not expressly command him to act in his proper person.

Dalt. Sh. 34. But, in all cases where the writ commands the sheriff to go in person, there, the writ is his commission, from which he cannot deviate. But, if the sheriff return that he was there in person, and this return be received and filed, then any information to the contrary comes too late, because by the filing it is become a matter of record, against which no averment *in pais* lies, neither can the party have error upon the return.

Cro. Eliz.  
9, 10.  
*Clay's case*.

As, in a writ of partition, the sheriff must be on the lands in person according to the direction of the writ; and if he be not, the court upon information thereof, before filing the return, will order the filing to stay; and if upon examination it be so found, will award a new writ.

11 H. 4. 7.  
6 Co. 12.  
Hob. 13.  
Jenk. 181.

So, in a writ of redisseisin, in which by the statute of *Merton* the sheriff is judge as well as officer, he must execute it in person, and cannot make a deputy.

So,

So, in a writ of inquiry of waste, the sheriff must himself go in person and view the place wasted; for though in this case he is not in strictness judge, but is to inquire by the oaths of twelve men, &c. yet his writ being in nature of a commission, he must execute it in person; and, as he is *in loco judicis*, if the land lie in a franchise, the sheriff cannot make his warrant to the bailiff of the franchise, or return *mandavi ballivo*, &c. for he cannot grant over the judicial power, but he must enter the liberty and execute the writ himself.

Reg. 23.  
6 Co. 12.  
8 Co. 52.  
4 Co. 65.  
2 Inst. 390.  
Dalt. 34.  
Dyer, 204.  
pl. 1.

So, in a writ of admeasurement of dower and pasture, the high sheriff must execute these in person, being vicontiel and not returnable, and to which the parties may plead before the sheriff in the county, if they think fit, unless they are removed in *C. B.* by a *pone*, which the plaintiff may do without shewing any cause.

F. N. B. 148.  
Dalt. Sh. 34.  
Noy, 21.

So, in a writ *de nativo habendo*, if it goeth to the sheriff to hold plea of the matter, there, he is both judge and officer, and must execute it in person; but, where it is directed to the sheriff returnable in *B.*, there, his office is ministerial only, and he may execute it by his under-sheriff or deputy.

Bro. Offic.  
36.  
Dalt. Sh. 34.

In a writ of *justicies*, which is a commission to the sheriff to hold plea above 40 s. the high sheriff must execute it in person; and if it be done by the under-sheriff, the judgment thereon is utterly void, and *coram non judice*.

2 Leon. 34.  
— Yet in  
this case my  
Lord Coke  
holds that  
the suitors  
6 Co. 12, 13.

are judges, and not the sheriff.

In hath been adjudged, that an assignment of prisoners by the under-sheriff is as valid as if made by the high sheriff himself.

M. 6 G. 2.  
in C. B.  
Holt v  
Greenlaw.

#### 4. The Manner of appointing Bailiffs and other (a) Officers; and therein of his being answerable for their Acts.

— must appoint four persons in the county in his name to make replevins, &c.

(a) By the  
1 & 2 Ph. &  
M. c. 12.

Although all writs and processes are directed to the high sheriff, and usually delivered to the under-sheriff, yet, it being impossible for them to execute them all themselves, they are to make out warrants or precepts to their (b) bailiffs and other officers, who are to execute the same; and for that purpose they are empowered to appoint a bailiff in each hundred, and may appoint a special bailiff or particular person to execute a writ upon any certain occasion.

Dalt. Sh.  
103. 117.  
Keilw. 86.  
(b) A bailiff  
is to take  
the same  
oath ap-  
pointed to be  
taken by the  
under-she-  
riff, by the

Statute 27 Eliz. c. 12. but a special bailiff, or one employed by the sheriff for a particular time only, as to execute one writ, &c. is not obliged to take the oath. Jon. 249. 2 Lev. 151. — The sheriff may take security from them, as he is answerable for their acts. Still. 18. — For the form of such securities, vide Dalt. 118. — Cannot abridge them of their power. 2 Brownl. 283.

But, though the sheriff, having a writ directed to him, may authorise others to execute it, yet the person to whom he directs it must himself (c) personally execute it; but any one may lawfully assist him.

Dalt. Sh.  
117.  
(c) And  
therefore an  
arrest by a  
bailiff's fol-

lower is not good. 6 Mod. 211. — And there made a *quære* whether good, though in the bailiff's presence. [The arrest must be made by the authority of the bailiff; but he need not be the hand that

arrests;

arrests, nor in the presence, nor actually in sight, nor within any precise distance, of the person arrested. *Elatch v. Archer*, Cowp. 65.] If a warrant be directed to two men jointly to arrest another, yet either of them alone may do it. Co. Lit. 181. — If a warrant be directed to a bailiff, and stranger *conjunctim et divisim*, it may be executed by the stranger only. Dalt. Sh. 104.

Noy, 101.  
Moor, 770.

If a blank warrant be filled up with the name of a special bailiff, either by the party himself or bailiff, without the privity or subsequent agreement of the sheriff, this is such an abuse and contempt, for which an attachment will be granted.

Cases in  
B.R. 527. per  
Holt, Ch. J.

Also, the sheriff ought not to make a blank warrant for the attorney to fill up with a special bailiff.

2 Lev. 19.  
Jones v.  
Green *vide*  
Saund.  
392.

In trespass for a battery and imprisonment, the defendant justifies by writ out of the King's Bench directed to the sheriff, and a warrant thereupon made to him; the plaintiff demurs specially, because it is not pleaded that the writ was delivered to the sheriff in the common form; to which it was answered, that it was not necessary to be so pleaded; for if in truth a writ be sued out, and he make a warrant before the writ comes to his hands, it is well, and the precedents are both ways; and of this opinion was the whole court.

But now by the statute 6 Geo. 1. cap. 21. § 53. it is enacted, "That no high sheriff, under-sheriff, their deputies or agents, shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10 l."

And by the 54th section of the said statute, "Every warrant to be made out upon any writ out of the King's Bench, Common Pleas, or Exchequer, before judgment, to arrest any person, shall have the same day and year set down thereon as shall be set down on the writ itself, under forfeiture of 10 l., to be paid by the person who shall fill up or deliver out such warrant."

Roll. Abr.  
98.  
*Attorton v.*  
*Harward.*

If a bailiff errant take *J. S.* in execution at the suit of *J. D.* and after he escape by a rescue of himself, the sheriff, if he will, may have an action upon the case against the bailiff for his escape, because when he takes upon him to be his bailiff, there is an *assumpsit* in law to keep the prisoners safely, and not to suffer them to escape.

(a) For this  
*vide* 2 Inst.  
382. 466.  
9 Co. 98.  
2 Jon. 60.

Under-sheriffs, bailiffs, &c. are looked upon as the high sheriff's officers, for whom he shall answer as their (a) superior, and their acts are to many purposes considered as his own.

2 Lev. 153. Vent. 314. 2 Mod. 119. Noy, 69.

Latch, 187.  
Dalt Sh. 3.  
[(b) This  
distinction

But, though the high sheriff must answer for his under-sheriff and other officers, yet he is not to be punished criminally for their acts, nor to be imprisoned nor indicted for their misdemeanors (b).

that the sheriff is answerable *civiliter*, but not *criminaliter*, for the acts of his bailiffs, is perfectly correct, and adopted in several modern cases. And it is no objection to his being called upon to answer *civiliter*, that the acts done by his officers would also warrant a criminal prosecution against them. Nor is it necessary to found a proceeding against the sheriff, to shew a recognition by him of his bailiff's act. *Ackworth v. Kempe*, Dougl. 40. *Saunderson v. Baker*, 3 Will. 309. 2 Bl. Rep. 832. S. C. *Woodgate v. Knatchbull*, 2 Term Rep. 148.]

And therefore for the personal torts and injuries of such officers they must answer themselves (a): as, if the demandant in a writ of entry *sur disseisin* deliver a writ of summons to the under-sheriff of the county, and he summon the tenant upon the land accordingly, and notwithstanding do not return the writ, an action upon the case may be brought against the under-sheriff, if the plaintiff pleases; for, perhaps the sheriff had no notice thereof, and it may be the under-sheriff took the fees for the execution of the writ.

duty of the office of sheriff, by default of the under-sheriff or bailiffs, must be brought against the high sheriff, so that the case in the text is not law. *Cameron v. Reynolds*, Cowp. 403.]

Roll. Abr.  
94.  
Cro. Eliz.  
175.  
Leon. 146.  
S. C. March  
v. Astry.  
[(a) That is,  
criminaliter;  
for all actions  
for breach of

One who is arrested by a sheriff's bailiff is in the sheriff's custody, and if rescued, the sheriff may allege that he was rescued out of his custody.

But, although in law the custody of the bailiff be the custody of the sheriff, yet the sheriff upon a rescue cannot return that such a one was in his custody, and rescued out of the custody of his bailiff, because of the repugnancy; but he may return that he was rescued out of his own custody, although he was never in his actual custody, or that he was rescued out of his bailiff's custody (b).

custody: the return must be, that he was rescued out of *his* (the sheriff's) custody. *Per Buller, J.* 2 Term Rep. 156.]

2 Jon. 197.  
Lev. 214.  
2 Lev. 26.  
2 Salk. 586.  
pl. 2. et vide  
Sid. 332.  
2 Jon. 197.  
[(b) He cannot return,  
that the person was rescued out of the bailiff's

So, an arrest by the sheriff's officer is in judgment of law the same as if the arrest were by the sheriff in person, and if such officer suffer the party arrested to escape, the action must be brought against the sheriff.

But, if the sheriff direct his warrant to his bailiff, and afterwards *J. S.* put in his own name as special bailiff, and thereupon arrest the defendant, who escapes, here *J. S.* shall be only chargeable, and not the sheriff, because the defendant was never in the sheriff's custody.

[If the sheriff appoint a special bailiff at the nomination of the plaintiff, the latter must take the consequences of the acts of the bailiff, and cannot rule the sheriff to return the writ.]

*Hamilton v. Dalziel*, C. B. Hil. 1774, S. P.

5 Co. 89.  
Roll. Abr.  
94.  
Cro. Eliz.  
745.  
De Moranda  
v. Dunkin,  
4 Term Rep.  
119.  
1774, S. P.

## 5. Of his Jurisdiction over Gaols and Gaolers.

Although all gaols and prisons regularly belong to the (c) king, yet the sheriff shall have the custody of all persons taken by virtue of any precept or authority to him directed, notwithstanding any grant by the king of the custody of prisoners to another person.

subject may have the custody or keeping of them. 2 Inst. 100.—But it is said that none can claim a prison as a franchise, unless they have also a gaol-delivery. Salk. 343. 7 Mod. pl. 1.—Cannot be erected by less authority than by act of parliament. 2 Inst. 705. But vide 11 & 12 W. 3. c. 19. by which justices of peace on presentment of the grand jury are empowered to raise money for that purpose, and tit. Gaol and Gaoler.

And. 345.  
4 Co. 34.  
9 Co. 119.  
Cro. Eliz.  
829.  
(c) Although a

Latch, 16.  
*& vide* And.  
 345.

(a) By the  
 22 & 23 C. 2.  
 c. 20. § 13.

it shall not be lawful for any sheriff or gaoler to lodge prisoners for debt and felons together in one room, but they shall be kept apart, upon pain that they that offend against this act shall forfeit their office and treble damages to the party grieved. (b) By the 1 Ann. c. 6. those taken on an escape-warrant are to be sent to the county gaol.

Hob 202.

Latch, 16.

Sid. 318.

(c) The  
 Marshal of  
 the King's

Bench cannot keep his prisoners in other place than where the old prison is appointed, but the court of B. R. may by rule appoint it to be kept in any place in England, but then the marshal is to keep them, and the extent of the prison is to be limited by the rule. Cro. Car. 466. Roll. Abr. 810. — And that this was the proper method to be taken where the prisoners were in danger of the infection by the plague. Hutt. 29. *& vide* 19 Car. 2. c. 4. for empowering justices of peace to remove prisoners in case of infection.

See now

32 G. 2.

c. 28.

By the 2 G. 2. c. 22. § 1. "No sheriff, bailiff, or other officer shall convey any person by him arrested, by virtue of any process or warrant, to any tavern, alehouse, or other publick victualling or drinking-house, or to the house of such officer, or of any tenant or relation of his, without the free consent of the person so arrested, nor shall carry any such person to prison within 24 hours from the time of arrest."

This act has  
 been suffered  
 to expire.

But by the 3 Geo. 2. c. 27. § 6. "If any person shall be arrested by virtue of any process or warrant, and shall refuse to be carried to some safe dwelling-house of his own appointment, so as such dwelling-house be in a city or market-town, if such person shall be there arrested, or if out of a city or market-town, then within three miles from the place where the arrest shall be made, and so as such house be not the house of the person arrested, provided it be within the same county and liberty, it shall be lawful for the officer to carry the person so refusing to gaol by virtue of such process."

Reg. 295.

[The modern acts of parliament for the regulation of gaols seem to interfere a little with the sheriff's

power over his gaoler, and to introduce at least a concurrent power, acting as a check both upon the sheriff and his officer. *Vide* stat. 24 G. 3. sess. c. 2. 54. 31 G. 3. c. 46. 34 G. 3. c. 84.] (d) Where the new sheriff was not bound to take delivery of a prisoner but in the common gaol of the county. Poph. 85. 2 Leon. 54. Hard. 30. 33.

Confirmed  
 by 19 H. 7.  
 c. 10.

By the 14 E. 3. c. 10. "In the right of the gaols, which were wont to be in the ward of the sheriffs, and annexed to their bailiwicks, it is assented and accorded that they shall be rejoined  
 " to

“ to the sheriffs, and the sheriffs shall have the custody of the  
“ same gaols as before this time they were wont to have, and they  
“ shall put in such under-keepers for whom they will answer.”

And therefore if a gaoler, who is the sheriff's servant, suffers a prisoner to escape, the action must be brought against the sheriff, not against the gaoler; for an escape out of the gaoler's custody is by intendment of the law an escape out of the sheriff's custody.

2 Lev. 159.  
2 Jon. 62.  
2 Mod. 124.  
*et vide*  
5 Mod. 414.  
416. Where  
it is said in

general that gaolers are liable for escapes; but the question being there touching the escape of a person committed for a criminal offence must be understood of escapes in those cases, for which whoever *de facto* occupies the office of a gaoler, is liable to answer; nor is it material whether his title to the office be legal or not. Hal. P. C. 114. 2 Roll. Rep. 146. 2 Hawk. P. C. c. 19. § 28. *et vide* Hard. 29. 35. That where actions for escapes are said to lie against gaolers, such absolute gaolers are intended as writs are directed to. — Yet it has been holden by my Lord-Chief Justice Holt, that an action lies for a voluntary escape against the gaoler, as well as against the sheriff, it being in nature of a rescue. 2 Salk. 441. pl. 2. 3 Salk. 18.

(I) Of the preceding and succeeding Sheriff; and herein of the Acts necessary to be done by each of them.

THE old sheriff may execute his office until his writ of discharge be delivered to him; and by the statute 12 E. 4. c. 1. “ If any sheriff execute or return any writ or warrant within *Michaelmas* term after the 6th of *November*, and before any writ of discharge delivered to him, he shall not be damnified by the statute 23 H. 6. c. 8., although he hath occupied the office before the days of return *Crasfino* Martini, *Octabis* Martini, or *Quinden* Martini.”

Dalt. Sh. 18.

And by the 17 E. 4. c. 6. “ Every old sheriff shall have power as well to execute and return every writ or warrant, as to execute every other thing which to the office pertaineth, during the terms of St. *Michael* and St. *Hilary*, unless he be lawfully discharged.”

In an action of false imprisonment, the defendant pleaded that he was sheriff of W., and that by virtue of a *capias* directed to him he arrested the plaintiff, &c.; the plaintiff replied that J. S. was then sheriff; to which the defendant rejoined, that he had not notice of J. S.'s patent, and that no writ of discharge was delivered to him; and on demurrer it was adjudged for the defendant, and that he continued sheriff till the writ of discharge delivered to him, or perfect (a) notice of the new patent.

Moor, 186.  
364. St.  
John's case.  
(a) It seems  
the better  
opinion, that  
delivering  
the writ of  
discharge to  
the clerk of  
the county

court, though in the absence of the sheriff, is sufficient notice, because every person being obliged to give his attendance there, shall be presumed to be present. Dyer, 355. Crompt. 203. Dalt. Sh. 18.

But, if the old sheriff, after he is discharged, shall make his warrant or precept to any of his late bailiffs or officers to arrest another, and the officer by force thereof shall arrest the party, an action of false imprisonment will lie against both the sheriff and officer.

Dalt Sh. 18.

So,

Dyer, 41.  
Dalt. Sh. 18.

So, where the old sheriff returned the proclamation upon an exigent after that he was discharged of his office; it was adjudged, that the outlawry was void, and the party was discharged.

2 Roll. Abr.

457, 458.  
Bult. 70.

Dalt. Sh. 18.

(a) Thus,

*Istud breve  
prout indor-  
satur mihi*

All writs are by view and by indenture precisely to be set over by the old sheriff to the new, and if they have been executed by the old sheriff, they must be returned by him or in his name, and (a) indorsed by the new sheriff; but, if there hath been no execution by the old sheriff of them, then the return is to be in the new sheriff's name.

*deliberatum fuit per R. S. armiger. nuper vic. prox. predecessor. meum in exit. ab officio suo.* Dalt. Sh. 18.

Dalt. Sh. 19.

If the return of the old sheriff happen to be erroneous, and that a new sheriff be chosen, yet the court may cause the old sheriff or his under-sheriff, clerk, or deputy, to amend the same.

Cro. Eliz.

365, 366.

Comyns,

355.

Hob. 266.

Bult. 70.

2 Leon. 54.

The old sheriff is to deliver over by (b) indenture all the prisoners in his custody charged with their respective executions, and till such delivery by him they remain in the custody of the old sheriff, and he shall be answerable for them.

3 Co. 72. 2 Roll. Abr. 457. (b) For the form whereof, *vide* Dalt. Sh. 18.

3 Co. 72.

Cro. Eliz.

365.

(c) That

there is no

remedy but

to take him

again.

1 Mod. 14.

If the sheriff dies, and before another is made, one in execution goes at large (c), this is no escape, for the prisoners were in the custody of the law till a new sheriff made; but after a new sheriff is made, he is bound to take notice of all executions against any persons he finds in the gaol, for there is no person to make delivery or give him notice thereof.

3 Co. 71.

Westley's

case, ad-

judged upon

a special ver-

dict. Poph.

85. S. C.

Cro. Eliz.

365. S. C.

Moor, 688.

S. C. ad-

judged upon

a special

verdict,

being found

also that the old sheriff gave no notice of this execution to the new, and affirmed upon a writ of error in the Exchequer-chamber. But it is said, that it seemed to the justices, that notice by parol would have been sufficient, though the execution was not mentioned in the indenture. (d) And the new sheriff is to be charged with an escape after. Cro. Jac. 380. — But, if a prisoner is omitted in the indentures, and so not turned over at all, he remains in the custody of the old sheriff. Sid. 335. Noy, 51.

2 Leon. 54.

2 Keb. 224.

If *J. S.* be in execution at the the suit of *A.* and *B.* severally, and the sheriff at the end of his year deliver him over to the new sheriff by indenture, in which indenture the execution at the suit of *A.* only is mentioned, and the execution at the suit of *B.* is omitted, this is an escape, for which an action lies against the old sheriff, though *J. S.* continues in prison; for *eo instante* that the old sheriff hath delivered his prisoners to the new, (d) he ceases to have the custody of them, and he cannot be in the custody of the new sheriff at the suit of *B.* with which he was never charged; and though the executions are of record, yet the new sheriff is not bound to take notice thereof.

M. 6 G. 2.

in C. B.

Holt v.

Greenlaw.

19 Vin. Abr.

454. pl. 8.

Barnes's

Notes, C. P.

259.

It hath been adjudged, that an assignment by the under-sheriff is sufficient; and also that an assignment of the prisoners, though not by indenture, shall bind the new sheriff, if he has notice of the causes wherewith the prisoners are charged; for it seems the form of the indenture was introduced only for the conveniency and security of sheriffs; and therefore if a note or schedule only is



made of the prisoners, with the causes of their imprisonment, and this delivered to the new sheriff, and thereupon he accepts the custody of the (a) gaol, they are as effectually turned over as if done by indenture; *volenti non fit injuria*; and the new sheriff can no more pretend ignorance when the trust he engages in is declared to him by deed-poll, than by indenture.

2 Kel. 125.  
pl. 101.  
*Ante*, 441.  
Dalt. 15.  
Sid. 335.  
pl. 21.  
2 Roll.  
Rep. 146.

but the new sheriff may compel the old sheriff to make an assignment by indenture. 2 Kel. 125. pl. 101. — (a) That the new sheriff is not bound to take delivery of a prisoner but in the common gaol of the county. Poph. 85. 2 Leon. 54. Hardr. 30. 33. — A writ for the new sheriff to compel an assignment by indenture from his predecessor. Reg. 295.\* — \* Sheriffs required to turn over all process not executed, by indenture to their successor, 20 G. 2. c. 37. — Writs to be turned over to the succeeding sheriff, *id.* — [No sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do within six months after the expiration of his office. *Id.* § 2. A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within the above time, though he was requested by the party to return it before the expiration of the six months. *Rex v. Jones*, 2 Term Rep. 1.]

If upon a *fi. fa.* the sheriff seize goods, and he return that goods to such a value remain in his hands *pro defectu emptorum*, and he be removed, yet he, and not the new sheriff, is to proceed in the execution; for execution being an entire thing, he who begins must end it; and upon his neglect a *disfringas nuper vicecomitem* lies, of which there are (b) two sorts, one to distrain the old sheriff to sell and bring in the money, the other to sell and deliver the money to the new sheriff, to bring it into court, which plainly shews his authority continues by virtue of the first writ.

Dalt. Sh. 19.  
Saik. 323.  
(b) For which *vide*  
Thes. Brev.  
90. 34 H. 6.  
36. Raft.  
164. And that the *disfringas*, which commands the

new sheriff to distrain the old one to sell and bring in the money, is the most usual. 6 Mod. 299.

And therefore it hath been adjudged, that if the sheriff on a *fi. fa.* seize goods to the value of the debt, and pay part of the debt, and be discharged before he hath sold the rest of the goods or returned his writ, that notwithstanding such discharge, and without any writ of *venditioni exponas*, he may sell the goods remaining in his hands, and such sale and execution shall be good by force of the writ of *fi. fa.*

Cro. Jac. 73.  
Moor, 557.  
Roll. Abr.  
893, 894.  
Aire v.  
Aden. But in Yelv. 44.  
S. C. it is said to be adjudged

*cont.* but seems to be a mistake; & *vide* Hob. 207. Cro. Eliz. 597. Yelv. 6. Dyer, 98. Godb. 276. Cro. Jac. 515. Latch, 117. 4 Leon. 20. 2 Saund. 47. 345. Mod. 31.

If a *fi. fa.* (before the statute) had been delivered to the sheriff 9 Nov., and he had executed it the same day, and after a writ of discharge, dated 6 Nov. had been delivered to the sheriff the same day, if it did not appear the sheriff had notice of it before the execution served, the execution had been good.

Cro. Eliz.  
440.  
Boucher v.  
Wifeman.

By the 3 Geo. 1. c. 15. § 9. "When any sheriff shall by process out of the Exchequer extend any goods, &c. into the hands of his majesty, &c. for any debts due to the crown, and shall die or be superseded before a *venditioni exponas* be awarded for sale, or before he has made actual sale thereof, and a writ shall afterwards be awarded to a subsequent sheriff, who shall make sale of such goods, &c., the barons of the Exchequer, if sitting, or if not sitting, they, or any one of them of the degree of the coif, shall settle the fees or poundage for such seizure and sale between such preceding and subsequent sheriff, with regard to the trouble each sheriff had in the execution of such process."

## (K) Where more than one Sheriff.

Priv. Lond.  
5. 272.  
3 Co. 72. b.  
2 Inst. 382.  
2 Show. 262.  
pl. 268.  
Skin. 104.  
pl. 3.  
Carth. 482.  
Leon. 284.  
Gilb. Hist.  
P. C. 180.

IN *London* and *Middlesex* there are two sheriffs; the beginning of which custom seems to be founded on the charter of King *John*, who granted the sheriffwick of *London* and *Middlesex* to the mayor and citizens of *London*, at the farm of 300*l.* *per ann.*, so that being a grant in fee of the sheriffwick to them as a corporation, they had a right to name one or more officers in order to execute the same, and they thought it proper to name two officers indifferently to execute both offices, both of whom execute as one sheriff, though the writ in *Middlesex* is directed to them as one, *vic' com' Middlesex præcipimus tibi*; in that of *London* it is to both *vic' comitib' London' præcipimus vobis*. The reason of this difference seems to be, that before this grant of the sheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the sheriffs for *London*, and the *London* sheriffs were responsible to the king for the *London* profits of the sheriffwick; and that was the reason why two were appointed, that both might be responsible, and this nomination was, that the citizens might exhibit to the king responsible persons; and that seems to be the reason that in many of the corporations that are cities and counties, there are two sheriffs. But when, by the charter of King *John*, the sheriffwick of *London* and *Middlesex* was granted to the citizens as a perpetual fee-farm, then they elected their sheriffs, who before were nominated for *London* only, and the election of the two was for both sheriffwicks; but the directions of the king's writs were as before, *viz.* in *London* to the two sheriffs, and in *Middlesex* as if there was only one.

4 Mod. 65. Where there are two sheriffs, they regularly make but one officer, and therefore if one of them die, the office is at an end until another is chosen, and the courts of *Westminster* can award no process to the other.

Hob. 701. If one sheriff of *London* make his return without his fellow, this being as no return at all is not aided by the statute, which aids insufficient returns, for the court takes notice that one sheriff there is two persons.

4 Mod. 65. But, though they are considered but as one officer, yet, where in an information for a riot committed in *Chester*, it was suggested on the roll that one of the defendants was sheriff, whereupon the *v. vires* was prayed and directed to the other sheriff, and the defendants were found guilty; and it was moved in arrest of judgment that the *venire* should be awarded to the coroner, because both sheriffs make but one officer; in this case it was adjudged, that the *venire* was well awarded, and that where one sheriff is challenged, the other shall supply the place; and that the coroner is not the person to execute the process of the king's courts but where the proper officer is wanting, which cannot be, where there is one sheriff.

And at *London*, against *Player*, the *venires* were directed to the other sheriff alone; & vide Stil. 342.

In a writ of error to reverse an outlawry, among other errors, it was assigned, that the direction of the exigent to the sheriffs of the city of *Lincoln* was *quod capias corpus ejus ita quod habeas corpus ejus, &c.*, where, they being two sheriffs, the writ ought to have been *capiatis et habeatis : sed non allocatur*, for they both are but one officer to the court; and although in the end of the writ it is *ita quod habeatis ibi hoc breve*, yet there is no repugnancy, for it is good both ways.

Cro. Jac.  
576.  
Gargrove v.  
Markham.

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for, it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor.

Cro. Eliz.  
625.  
Benion v.  
the Sheriffs  
of the City  
of York.

A prisoner in *Wood-street* compter upon mesne process on a plaint levied against him, &c. escaped; whereupon the plaintiff brought his action against both sheriffs of *London*, and upon a demurrer to the declaration the plaintiff had judgment; and it was resolved, that though the plaint was levied before one defendant only in his court, and the prisoner escaped out of his compter, yet that both sheriffs had the custody of the prisoners in both compters, and by consequence the action was well maintainable against both.

Carth. 145.  
Show. 162.  
Riding v.  
Edwin.

## (L) Of his Duty and Acts as a Judicial Officer.

THE sheriff hath in many things a judicial authority, and particularly in his torn, which is the king's court of record holden before the sheriff for the redressing of common grievances within the county.

Vide Juris-  
diction of  
this court,  
tit. Courts.

In this court the sheriff had anciently a very large and ample jurisdiction, for he could not only inquire of all capital offences, as treasons and felonies, but likewise issue process on them, and determine the same. But his power herein is now much restrained by statute; and 1st, by the statute of *Magna Charta*, c. 17. by which it is enacted, "That no sheriff, constable or other bailiff of the king shall hold pleas of the crown." 2dly, By the statute of 1 E. 4. c. 2. his power of making out process upon these indictments is taken away as well in case of indictments of felony, as other misdemeanours within his cognizance; but he is to deliver all such presentments and indictments to the justices of the peace at their next sessions, who are to make out process thereupon, and hear and determine them: but, if the original presentment were not within the jurisdiction of the torn, the justices of peace ought not to proceed upon such indictments, though removed before them.

Crompt. Jur.  
212.  
Stamf. 84.  
2 Inst. 32.  
Dalt. Sh. 25.  
2 Hal. Hist.  
P. C. 69.  
2 Hawk.  
P. C. c. 10.

But, though the sheriff by the abovementioned statutes is restrained from determining in capital offences, and issuing process in such cases, yet hath he still in his torn, a judicial authority *virtute officii*, of inquiring and taking presentments of all capital offences, of a publick nature, as all treasons and felonies at (a) com-

2 Hawk.  
P. C. c. 10.  
2 Hal. Hist.  
P. C. 69.  
(a) And  
therefore  
cannot take

an inquisition of rape, because as the law now stands, it is only felony by statute.  
 2 Hal. Hist. P. C. 69.  
 2 Hawk. P. C. c. 10. § 15.  
 mon law, assaults and batteries, if accompanied with bloodshed; all affrays, being *in terrorem populi*; common grievances, as breaking of hedges, dikes, or walls; all common nuisances, as annoyances to common bridges or highways, bawdy-houses, &c., and all other such like offences, as selling corrupt victuals, breaking the assise of beer and ale, neglecting to hold a fair or market, keeping false weights or measures, &c.

Also, a sheriff, as judge of a court of record, may in his torn impose a fine on all such as shall be guilty of a contempt in the face of the court, and on a suitor refusing to be sworn, and on a bailiff refusing to make a panel, and on a tithingman refusing to make a presentment, and on a jurymen refusing to present the articles given in charge, and on a person duly chosen constable refusing to be sworn.

Dalt. Sh. 25.  
 3 Mod. 138.  
 But he cannot take a presentment concerning the freehold, as he cannot hold plea of lands; and therefore if a presentment charge a person with not repairing a highway as he ought to do by the tenure of his lands, this is to be removed into the King's Bench, and there traversed.

Cro. Car. 26.  
 2 Hawk. P. C. c. 8. § 4.  
 The sheriff, as he is a principal conservator of the peace within his county, may *ex officio* award process of the peace, and take surety for it; and it seems the better opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation or matter *in pais* only, for that it is taken by him by virtue of the king's commission, by which he is intrusted with the custody of the county, and consequently has by it an implied power of keeping the peace within such county.

Dalt. Sh. 34.  
*Vide* what writs he is to execute in person.  
 In some cases the sheriff hath two powers, or a double or two-fold authority; the one as judge, and the other as an officer, in the one and the same business; as in a writ of redisseisin, in a writ of inquiry of waste, in a *nativo habendo*, and in a writ of admeasurement of pasture, &c. in these cases, the writ is as a commission to the sheriff, and by virtue thereof the sheriff is judge of the cause.

## (M) Of his Duty and Acts as a Ministerial Officer: And herein,

1. That he is the proper Officer to execute all Writs, except in Case of Partiality.

Dalt. Sh. 96.  
 Plowd. 74.  
 Dyer, 60.  
**T**HE sheriff is the immediate officer to the king's courts, to whom all writs and processes are regularly to be directed, and who is to execute the same without favour, dread, or corruption, to which he is sworn.

Dalt. Sh. 101, 102.  
 And as this is an employment for the good and convenience of the publick, if the sheriff refuse to receive a writ, or to execute it, this is an offence of a publick nature, for which he may be fined

(a) fined and imprisoned, and such an injury to the party grieved for which an action on the case lies.

(a) An exigent delivered to the

Sheriff was embezzled, and a copy of it returned by him, for which he was amerced 30*l.* for the return of the copy, and 20*l.* for the embezzlement. 5*H.* 4, 5. Dalt. Sh. 202.

And if any, says *Dalton*, fear the malice, indirect dealing, or negligence of the sheriff, &c. in the execution of any writ, they may deliver their writs in the open county court, or in any other place in the county; and may take of the sheriff or under-sheriff, being present, a bill, wherein the names of the demandants and tenants mentioned in the writ shall be contained, whereto, upon request made by him which delivered the writ, the sheriff or under-sheriff shall put to their seal for a testimony, without any fee; and if they refuse, others present may put their seals as witnesses. Dalt. Sh. 202.

But, though the sheriff is the proper officer to whom process is to be directed, and who is to execute the same, yet, if he be partial, that is, such a one as from his consanguinity or affinity, his being under the power of either party, cannot be presumed indifferent in making a return of a jury, in such case, the *venire* shall be directed to the coroners, if they are impartial, or to those of them who are so; and in case all the coroners are partial or not indifferent, as every officer who hath any way to do with the administration of justice ought to be, then the *venire* shall be directed to two elisors named by the court, against whom for that reason no challenge can be taken. Lit. 153.

But, as the sheriff is the proper officer to return juries, if there be no legal exception against him, the court cannot slip him, and order another to return a jury, without the consent of the parties, to try an issue at the *nisi prius*. But, if there be any lawful objection to him, and it appear so on affidavit, then a special jury may be struck by the master of the office without the consent of the parties. Mod. Cases, 248.

If one that is sheriff of a county levies a fine, the writ of covenant is to be directed to the coroners; for though the sheriff is the proper minister for the execution of all writs, yet, where the writ is brought against himself, and where he with others are parties to it, to prevent partiality, which every one is naturally guilty of, to himself, it has been the practice to direct the writ to the coroners. Cro. Car. 415, 416. 1 Roll. Abr. 797.

In replevin it appeared that the *liberate* on a statute was executed by the connuee, being himself sheriff; and this was held erroneous. Moor, 547.

If a sheriff of a county in a city be in contempt, the attachment is to go to the coroner, and not to the mayor or chief officer of the corporation in such city or town; and if the offender be out of his office, the attachment shall be directed to the new sheriff. 2 Vent. 216.

2. That he cannot dispute the Authority by which they issue, nor object any Irregularity in them.

Dalt. Sh.  
104.

Neither the sheriff nor his officers are to dispute the authority of the court out of which any writ, process, or warrant issues, but are at their peril truly to execute all such writs, &c. as are directed to them by the king's judges and justices, according to the command of the said writs, and hereunto they are sworn.

Dyer, 60.  
9 Co. 68.  
2 Bulst. 65.  
But now  
vide title  
Privilege.

And hence it hath been held, that if a *capias*, exigent, or writ of execution issued against a peer, and was delivered to the sheriff, that he was obliged to execute it; and that if any such writ issued, and the party was taken thereupon and escaped, an action lay against the sheriff.

22 E. 4. 33.  
10 Co. 76.  
Dalt. Sh.  
106.

But herein there is an established distinction mentioned in a variety of books and cases, to wit, that when a court hath jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, there, the officer or minister of the court who executes the precept, is excusable; for the rule is, *quicumque jussu judicis aliquid fecerit non videtur dolo malo fecisse, quia parere necesse est*. But, when the judge hath no jurisdiction of the cause, there, the officer is not obliged to obey, and if he does, it is at his peril, though he do it by virtue of a precept directed to him; a void authority being the same as none at all.

2 Leon. 84.  
Dyer, 175.  
8 Co. 141.  
5 Co. 64.  
2 Bulst. 64.  
Cro. Jac.  
280.  
Poph. 203.  
2 Saund.  
100.

3 Mod. 325. Carth. 148. 3 Wils. 345.

2 Bulst. 64.  
Dalt. Sh.  
105.

(a) Wherein  
escape the  
plaintiff de-  
clared, that the sheriff arrested J. S. by virtue of a *latitat*, without saying out of what court it issued; and it was urged, that though the sheriff could not take advantage of an erroneous process, that yet he might of a void writ. 5 Mod. 413. Ld. Raym. 397.

Therefore if a *formedon* issues out of the court of King's Bench, or an appeal out of the Common Pleas, though these are (a) superior courts, yet not having jurisdiction in these matters, the sheriff is not obliged to execute the writ.

Dalt. Sh.  
107.

If justices of peace arraign a person of treason in their sessions, who is convicted and executed, this is felony as well in the justices as sheriff or officer, who executed their sentence; but, if he had been indicted of a trespass, found guilty and hanged, though this had been felony in the justices, yet it would not be so in the sheriff, because a matter in which the justices had jurisdiction, and in which they only were to blame in exceeding their authority.

Roll. Abr.  
209.  
Richardson  
v. Bernard;  
et vide  
Nov. 45.  
2 Show. 424.  
Pl. 397.  
2 Lutw.  
359.

In an action upon the case in *Banco Regis* against an officer of the inferior court for an escape, if the plaintiff declares that he brought an action against J. S. in the said inferior court (as in *Kingston upon Hull*) upon an obligation made (b) at *Hallifax in comitatū Eborum*, and does not allege this to be within the jurisdiction of the said inferior court, and that upon this judgment was given, and execution granted, and the defendant took him

in

in execution and suffered him to escape, and thereupon he hath brought this action; this declaration is not sufficient to charge the defendant, because it is not alleged that the obligation was made within the jurisdiction of the court; for though the action be transitory, yet this inferior court having but a limited jurisdiction of things arising within the jurisdiction, (c) the proceedings there were *coram non judice*, and wholly void, of which the officer shall take advantage in this action upon the escape.

cause of action, by the declaration appearing to be out of the jurisdiction, was the cause of this action not lying. Skin. 51. 2 Mod. 197. 3 Lev. 23. like point. (c) 4 Inst. 231. 3 Lev. 23. 234.

So, if *A.* declares that he prosecuted one *J. S.* in the court of *Ely* upon a bond made *infra jurisdictionem*, upon which he was in execution, and that the defendant suffered him to escape, if the jury find that there was such a prosecution, but that the bond was not made *infra jurisdictionem*, the action does not lie; for all that was done was *coram non judice*; and therefore no legal commitment; and though the defendant in the court below pleaded *non est factum*, yet that could not give the court any jurisdiction which it had not originally in the cause.

If after the year a *capias ad satisfaciendum* is taken out, and the defendant thereupon arrested, and after suffered to escape, debt lies for this escape (a), though the process was erroneously awarded; for it was sufficient to arrest him, and the sheriff may justify in an action of false imprisonment, and (b) therefore cannot let him at large.

775. (a) That the sheriff can take no advantage of error in the process. Cro. Eliz. 767. 893. 2 Bullst. 258. 3 Co. 142. Godb. 27. Noy, 78. Cro. Jac. 280. 289. Stil. 232. 3 Mod. 325. Carth. 148. — But otherwise, if the arrest was void; as if the arrest, on which the escape is supposed, is laid to be out of the county of which the defendant is sheriff. Cro. Eliz. 877. *et vide* Noy, 51. Brownl. 79. Owen, 72. 5 Mod. 413. — If the judgment is reversed for error, the sheriff may plead *nil tiel record*. 3 Co. 142. Saund. 39. Lev. 95. (b) Though the sheriff may justify the execution of a *capias* tested out of a term, yet the plaintiff shall not take advantage thereof so as to charge the sheriff for an escape. 7 Mod. 30. 2 Salk. 700. pl. 4. *per* Holt, Ch. J.

If one taken upon a writ of *excommunicato capiendis*, upon a sentence in the spiritual court for non-payment of money decreed for tithes and costs, escapes, an action will lie against the sheriff; for though this is founded on a matter merely spiritual, yet the process issues out of a temporal court, and is directed to and executed by a temporal officer, and the damages consequential thereupon are temporal.

If a commission of bankruptcy issues against *A.* who refuses to be examined, and thereupon he is committed to prison, and the gaoler suffers him to escape, as the commissioners had sufficient authority to commit, an action lies by the creditor for the escape.

If one be taken on a *capias ad satisfaciendum*, between the teste and return whereof a whole term intervenes, and the sheriff suffer him to escape, an action lies against him; for this writ was not void, the party not being prejudiced thereby, for he had no day

(b) Salk. 202. Said it would have been otherwise if it had not appeared where made. And Lutw. 1567. it is said the

2 Mod. 29, 30. Squibbs v. Hole, adjudged by three Judges against Ellis.

Cro. Eliz. 188. Bushe's case. 7 Mod. 29. Salk. 273. pl. 4. S. P. adjudged. Ld. Raym.

Cro. Eliz. 767. 893. 2 Bullst. 258. 3 Co. 142. Godb. 27. Noy, 78. Cro. Jac. 280. 289. Stil. 232. 3 Mod. 325. Carth. 148. — But otherwise, if the arrest was void; as if the arrest, on which the escape is supposed, is laid to be out of the county of which the defendant is sheriff. Cro. Eliz. 877. *et vide* Noy, 51. Brownl. 79. Owen, 72. 5 Mod. 413. — If the judgment is reversed for error, the sheriff may plead *nil tiel record*. 3 Co. 142. Saund. 39. Lev. 95. (b) Though the sheriff may justify the execution of a *capias* tested out of a term, yet the plaintiff shall not take advantage thereof so as to charge the sheriff for an escape. 7 Mod. 30. 2 Salk. 700. pl. 4. *per* Holt, Ch. J.

Lutw. 121. Slipper v. Macon, adjudged.

Roll. Rep. 47. 2 Bullst. 236. Moor, 834. Barns v. Gary.

Salk. 700. pl. 4. Ld. Raym. 775. Shirley v.

Wright.  
[See the  
same dis-  
tinction, and  
this case  
cited with  
approbation  
by De Grey, C. J. in 3 Will. 344-5.]

in court, and must however lie in prison; otherwise, where taken upon a *capias ad respondendum*, in which a term intervenes between the teste and return, for such writ is void, and by the intermission the cause is discontinued and out of court, and so the sheriff not chargeable.

## (N) How he is to execute such Writs: And herein,

1. That it must be without Favour or Oppression, and after such Writ is actually taken out, and before it is returnable.

Dalt. Sh.  
109.

**T**HE sheriff being obliged to execute every writ and process issuing, and directed to him by lawful authority, he is likewise obliged by the duty of his office to execute such process with the utmost expedition, or as soon after he receives it as the nature of the thing will admit of. And herein there cannot be a surer rule for him to go by than a strict observance of what is enjoined by the writ. But, as on the one hand he must not shew any favour, nor be guilty of any unreasonable delay; so on the other hand, he must not be guilty of oppression, nor make use of other force nor greater violence than the thing requires.

Dalt. Sh.  
110.

If the defendant doth the thing commanded by the *precipe*, yet the sheriff is to serve the process, and to make return thereof.

9 Co. 69.  
Dalt. Sh.  
110.  
Cro. Jac.  
485.

A sworn and known officer, be he sheriff, under-sheriff, bailiff, or serjeant, need not shew his warrant or writ when he cometh to serve it upon any man's person or goods, although the party demandeth it; but a special bailiff must shew his warrant if the party demands it, otherwise he need not obey it. Also, such known officer upon the arrest ought to declare the contents of his warrant, at whose suit he makes the arrest, out of what court, when returnable, to the end that, if it be upon an execution, he may pay the money, and so free his person; or, if on mesne process, that he may put in bail, or agree with his adversary.

Dalt. Sh.  
111.

(a) If in  
truth a writ  
was sued  
out, and the  
sheriff had

If any officer do arrest a man before that he (a) hath a warrant, and afterwards do procure a warrant, or a warrant come to him to arrest the party for the same cause, yet the first arrest was wrongful, and the party grieved may have his action of false imprisonment.

made his warrant before the writ came to his hands, this hath been held well. 2 Lev. 19. 1 Saund. 208 — But now by the 6 G. 1. c. 21. it is enacted, That no high sheriff, &c. shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10 *l*.

Sid. 229.  
Ellis v.  
Jackson.

And as the sheriff cannot arrest before the writ issues, or make his warrant before it comes to his hands, it hath also been adjudged, that he cannot execute it after the return, not even the very next day after, and before the *quarto die post*.



2. Of his raising the *Posse Comitatus*.

By the common law the sheriff may raise the *posse comitatus* or power of the county, that is, such a number of men as are necessary for his assistance in the execution of the king's writs, quelling of riots, apprehending traitors, robbers, &c.; and herein every person above the age of fifteen, not aged or decrepid, is bound to be aiding, and (a) if they refuse to assist, may be punished by fine and imprisonment.

Flet. 1. 2. c. 62.  
Bract. 1. 5. Lamb. 157. 2 Inst. 193. 453.  
(a) The statute 2 H. 5. c. 8. in- flicteth both Dalt. Sh. 355.

fine and imprisonment upon such as shall not aid the sheriff, they being thereunto required.

This power is not only allowed the sheriff, but likewise is given to his bailiff or other minister of justice, having the execution of the king's writs, who being resisted in endeavouring to execute the same, may lawfully raise such a force as may effectually enable them to overpower any such resistance. Also, a constable, or even a private person, may assemble a competent number of people, in order, with force to suppress rebels or enemies, or rioters, and afterwards with such force actually to suppress them. So, a justice of peace, who has just cause to fear a violent resistance, may raise the *posse* in order to remove a force in making an entry into, or detaining lands.

Dalt. Sh. 354. And. 67. Poph. 121. Moor, 656. 2 Inst. 193.

But, notwithstanding what was allowed and enjoined herein by the common law, it was thought necessary by (b) positive laws to remedy the great inconvenience which there was in ancient times by the resistance given to the king's writs, and therefore the statute (c) *Westm. 2. (13 Ed. 1. st. 1.) c. 39.* enacts as follows: *Multoties etiam falsum dant responsum mandando, quod non poterunt exequi preceptum regis propter resistantiam potestatis alicujus magnatis. De quo caveat vis de cetero, quia hujusmodi responsum multum redundat in dedecus domini regis et coronae suae, et quam cito sub-ballivi sui testificentur, quod invenerunt humo'i resistantiam statim omnibus omissis assumptis secum posse comitali sui eat in propria persona sua ad faciendi executionem, et si inveniat, &c.*

(b) By *Westm. 2. 32. 1. c. 17.* if a distress be unpounded in a castle or fortress, and detained, the sheriff or bailiff taking with him the power of the shire, &c. may cause

the said castle or fortress to be beaten down. *Dalt. Sh. 354.* (c) The original commitment for contempt seems to be derived from this statute, for since the sheriff was to commit those who resisted the process, the judges that awarded such process must have the same authority to vindicate it: hence, if any one offers any contempt to this process, either by word or deed, he is subject to commitment during pleasure, viz. *a qua non deliberetur sine speciali precepto domini regis*; so that notwithstanding the statute of *Magna Charta*, that none are to be imprisoned *sine judicio parium, vel per legem terrae*, this is one part of the law of the land to commit for contempts, and confirmed by this statute.

The words of this statute have been construed to extend to executions only, and not to writs on mesne process; and that the sheriff was not obliged to raise the *posse comitatus* where the party was bailable, for that it cannot be presumed that in such cases the king's writ will be disobeyed.

Roll. Abr. 807. May v. Proby, Roll. Rep. 388. 440. and Cro. Jac.

419. S. C. adjudged, and agreed *per cur.* that though the sheriff was not obliged, that yet he may take his *posse* to serve mesne process. *Cro. Eliz. 863. Noy, 40. Moor, 852. 3 Bulst. 198. 2 Lev. 144. 3 Lev. 46. S. P.*

he may take 2 Lev. 144.

Upon a writ of seisin the sheriff returned that he could not deliver seisin for resistance, and for that the sheriff did not take the power

*Fitz. Execut. 147.*

Dalt. Sh. 354. power of the county according to the statute, he was amerced 20 marks.

Dalt. Sh. 355. So, in a replevin, if the sheriff return that the cattle are in a fort or castle, so as he cannot make deliverance, he shall be amerced.

Dalt. Sh. 355. A man demands the peace in Chancery against a great lord, and hath a *supplicavit* directed to the sheriff, &c., there, if need be, the sheriff may take the *posse* to aid him to arrest such lord.

Dalt. Sh. 355. The sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution; and therefore if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced.

3 Inst. 161. But, though it be the duty of the sheriff or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to overpower any such resistance; yet, it is said not to be lawful for them to raise a force for the execution of a civil process unless they find a resistance, and it is certain that they are highly punishable for using any needless outrage or violence therein.

2 Inst. 193.  
Hob. 62.  
264.  
Fide title  
Attachment.

### 3. Of his breaking open Doors.

5 Co. 91. Regularly the sheriff cannot in executing a writ break open the door of a dwelling-house. This privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; and hence it is that every man's house is called his castle.

5 Co. 92. b. And therefore upon a *capias*, *feri facias*, or other process at the suit of a common person, the sheriff, after request to open the door, and denial, cannot (a) break the (b) house of the defendant, and in such case the sheriff would be a trespasser, though the execution would be (c) good.

537. Jon 430 Bulst. 46. (a) Cannot open a latch. Dalt. 350. — Where the door was a little opened to see who was there, and the bailiffs rushed in with drawn swords. Hob. 62. & vide Hob. 263, 264. (b) \* If the officer findeth the outward door open and entereth the house that way, or, if the door be open to him from within, and he enter, he may break open inward doors, if he findeth that necessary in order to arrest the defendant on mesne process in a civil suit. Fost. Cr. Law, 319.\* So determined in *Lee v. Gansell*. Loffit's Rep. 374 Cowp. 1. where the defendant was a lodger, and had separate apartments; but the street-door was open. (c) But it seems to be the modern practice in some cases, on complaint by affidavit, to discharge such execution, and to grant an attachment against the officer†. —† In Trinity term, 17 Geo. 3. the court of Exchequer set aside an execution issued under such circumstances, in the case of *Yeates v. Delamayne*, Esq.

5 Co. 91. But, notwithstanding this general rule, yet in all cases where the king is party, if the door be not open, the sheriff may break the door of the party, either to take him, or to execute the process, if he cannot otherwise enter therein; but, before he enters, he ought to signify the cause of his coming, and make request to have the door opened,

Upon a *capias* grounded upon an indictment for any crime whatsoever, or upon a *capias* from the King's Bench or Chancery, to compel a man to find sureties for the peace or good behaviour, or even upon a warrant from a justice of peace, for such purpose the officer may break open the door of a dwelling-house.

So, upon a *capias* (a) *utlagatum* or *capias pro fine*, in any action whatsoever.

c. 94. Moor, 609. Cro. Eliz. 908. Yelv. 28. (a) Though on mesne process, and at the suit of the subject. 2 Show. 87. pl. 78.

27 Aff. 35.  
12 Co. 131.  
Moor, 606.  
Crom. 170.

Goulf. 179.  
4 Leon. 41.  
Dalt. Sh.

So, upon the warrant of a justice of peace for the levying of a forfeiture in execution of a judgment or conviction for it, grounded on any statute which gives the whole, or but part of such forfeiture, to the king, and authorizes the justice of peace to give such judgment or conviction for it.

So, where a forcible entry or detainer is either found by inquiry before justices of peace, or appears upon their view.

So, upon a (b) commission of rebellion out of Chancery, the sheriff or his officers, or the commissioners, may break open the doors or house to apprehend the party, whether it be his own house or that of a stranger, if upon request such house is refused to be opened.

&c. issuing out of Chancery, it is said the officer cannot break open the door; but *quare*.

2 Jon. 233.

Dalt. Sh.  
353.

Dalt. Sh.  
353.  
Crom. 47.  
(b) But upon an attachment for a contempt,  
Dalt. Sh. 353.

So, in the execution of a commission of bankruptcy, the commissioners, or any officers deputed by them, may break open the houses, chambers, shops, warehouses, doors, trunks, or chests of the said bankrupt, wherein the said bankrupt or any of his goods or estate shall be, or reputed to be.

By the 3 & 4 Jac. 1. c. 35. it is enacted, "That upon any lawful writ, warrant, or process awarded to any sheriff or other officer for the taking of any popish recusant standing (c) excommunicated for such recusancy, it shall be lawful, if need be, to break open any house."

Where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant by a constable or private person, it is lawful to break open doors in order to apprehend him; but, where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, that no one can justify the breaking open doors in order to apprehend him.

It is said to have been resolved, that where justices of the peace are by virtue of a statute authorized to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors of the persons who shall be named in any warrant made in pursuance of such statute, in order to be brought before the justices to take such oath, because such warrant is not (d) grounded upon a precedent offence, neither doth it appear that the party either is or will be guilty of any.

21 Jac. 1.  
c. 19.  
Dalt. Sh.  
353.

(c) Cannot otherwise break open a door on an excommunicato capiendo. Cro. Eliz. 747.

2 Hawk.  
P. C. c. 34.  
§ 7. and the authorities there cited.

2 Hawk.  
P. C. c. 14.  
§ 11.  
(d) Upon the ordinary warrant of a justice of peace, if not for felony or suspicion thereof, the officer cannot break open the door. Bull. 146.

5 Co. 93. 1. This privilege of a man's house extends only to the (a) owner, Sid. 186. but shall not protect any person who flies thither, nor the goods of (a) That is, any person conveyed thither to prevent a lawful execution; and for such per- son who lies there. therefore if a *fi. fa.* be directed to the sheriff to levy the goods of *A.*, and it happen that *A.*'s goods are in the house of *B.*, if after request made by the sheriff to *B.* to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house. Hob. 62.

5 Co. in Se- In a writ of seisin or *habere facias possessionem* in ejectment, the maine's case. sheriff may justify the breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently, the sheriff must have all power necessary for this end: besides, in this case, the law does not look upon the house as belonging to the tenant, but to him who has recovered.

Sid. 186. It hath been adjudged, that the sheriff on a *fi. fa.* may break Keb. 693. open the door of a barn standing at a distance from the dwelling- Penton v. house, without requesting the owner to open the door, in the same Browne. manner as he may enter a close, &c.

Brownl. 50. So, on a *fi. fa.*, when the sheriff or his officers are once in the 2 Show. 87. house, they may break open any (b) chamber-door or trunks for pl. 78. the completing the execution. Comb. 17,

327. (b) That this must be after request and refusal. Palm. 54.

Cro. Jac. So, if the sheriff's bailiffs enter the house, the door being 555. open, and the owner locks them in, the sheriff may justify break- Roll. Rep. ing open the door for the enlarging and setting at liberty the bai- 132. liffs; for, if in this case, he were obliged to stay till he could procure Palm. 52. a *homine replegiando*, it might be highly inconvenient: also, it White v. seems, that in this case the locking in the bailiffs is such a disturb- Whitshire. ance to the execution, that the court will grant an attachment for it.

Roll. Rep. So, if one be arrested, and after escape into his house, the she- 138. riff may break the doors to take him, as, where one opened his Palm. 54. casement, and the sheriff took him by the hand, &c. 6 Mod. 173.

Bro. Falie So, where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his pre- Imp. prison- sence fly to a house, and are immediately pursued by him, and he ment, 6. is not suffered to enter in order to suppress the affray, in the first Crom. 170. case, or to apprehend the affrayers in the other, in either case, he may break open the doors.

#### 4. Whether he can execute his Writ on a Sunday.

[Vile Tom. This depends on the statute 29 Car. 2. c. 7. § 6. by which it is 3. pag 476.] enacted, "That no person upon the Lord's Day shall serve or exe-  
"cute, or cause to be served or executed, any writ, process, war-  
"rant, order, judgment, or decree, (except in cases of treason,  
"felony, or breach of the peace,) but that the service of every  
"such writ, process, warrant, order, judgment, or decree, shall  
"be void to all intents and purposes whatsoever; and the per-  
"son

“son or persons so serving or executing the same shall be as liable  
“to the suit of the party grieved, and to answer damages to him  
“for doing thereof, as if he or they had done the same without  
“any writ, process, warrant, order, judgment, or decree.”

In the construction hereof it hath been holden, that a citation  
out of the spiritual court may be served on a *Sunday*, by fixing the  
same to the church-door, and that the general words of this sta-  
tute do not extend to such process. 5 Mod. 449.  
Ld. Raym.  
706.  
Carth. 504.  
S. C. [Vide Tom. 3. pag. 476.]

It hath been adjudged, that a person may be taken on an escape  
warrant on a *Sunday*, because in nature of fresh pursuit, which  
may be on a *Sunday*, and this only in nature of it, though it be by  
a new method; and this is no original process, but the party is  
in still upon the old commitment continued down. 2 Salk. 626.  
pl. 7.  
Parker v.  
Sir William  
Moor.  
6 Mod. 95.  
S. C.

That no indictment can be taken on a *Sunday*; and hence it  
hath been holden, that in every caption of an indictment taken in  
a sheriff's torn or court-leet, the day whereon it was taken ought  
to be set forth, that it may appear not to have been on a *Sun-  
day*. 2 Saund.  
250.  
Vent. 107.  
2 Keb. 731.

As this statute makes all arrests unlawful, it seems the better  
opinion, that the killing an officer who endeavours to arrest a per-  
son on a *Sunday* is not murder, though it had been otherwise, had  
such publick officer been killed on an ordinary day. Hawk. P. C.  
c. 32. § 58.

That the arrest is void, so that the party may have an action of  
false imprisonment. Salk. 78.  
pl. 1.  
5 Mod. 95.

Also the court will relieve on motion, and discharge from such  
arrest without putting the party to his *audita querela*. 6 Mod. 95.  
[Note, in  
the preced-  
ent case, the court refused to relieve upon motion; and in this case, Holt said, it must be by *audita querela*; the arrest on a Sunday being a fact traversable.]

## 5. In what Manner he is to do Execution.

The sheriff in doing execution must be careful that he observes  
the direction of the writ, which is his authority, as in executing  
a *fa. fa.* or *levari fa.*, by the first of which the goods and chat-  
tels of the debtor only can be taken in execution; and though by  
the latter the sheriff may not only sell the goods, but also collect  
the debt out of the profits of the land, as corn or grass growing  
thereon, yet in neither case has he authority to meddle with the  
debtor's lands, so as to sell or deliver such lands to the creditor in  
satisfaction of his debt. 3 Co. 11.  
Co. Lit.  
250. b.  
2 Inst. 453.  
Plow. 441.  
Finch, 101.  
Godb. 290.  
Comb. 470.

And as he has not by these writs a power to dispose of the free-  
hold or inheritance, hence it hath been adjudged, that the sheriff  
cannot deliver a furnace annexed to a freehold in execution; for  
though the writ gives the sheriff authority to levy the debt upon  
the goods and chattels of the debtor, and this is indeed a chattel;  
yet it does not give the sheriff any authority to break or disunite  
any thing from the freehold, which he cannot do unless particu-  
larly empowered by writ. Owen, 70.  
Roll. Abr.  
891.  
Off. of Ex.  
87.

But

Salk. 368. But it hath been held, that if a soap-boiler or other trader, being an under-tenant, for the convenience of his trade puts up vats, coppers, tables, partitions, and paves the backside, &c., upon a *fi. fa.* against him, the sheriff may take them in execution, in the like manner as the lessee himself might have removed them during the term.

Salk. 368. Otherwise, where such trader makes hearths and chimney-pieces to complete the house, and not for the convenience of his trade.

Dalt. Sh. The sheriff on a *fi. fa.* or *lev. fa.* cannot sell an estate for 145. 3 Co. (a) life, which being a freehold, can no more be affected by these writs than any estate of inheritance.

13. (a) But it is said, that since the statute 29 Car. 2. c. 3. an estate *pur autre vie* may be sold by the sheriff on a *fi. fa.* Comb. 391.

4 Co. 74. On these writs the sheriff may (b) dispose of leases for years, which are but chattels, be they of ever so long continuance: also, Dalt. Sh. upon an *elegit*, the sheriff may either extend a term for years, 137. 8 Co. that is, may deliver a moiety thereof to the plaintiff as part of the 171. 2 Inst. lands and tenements of the defendant, or may sell it absolutely, as 395. part of his personal estate.

(b) But, if a sheriff on a *fi. fa.* sells a lease or term of a house, he cannot turn the lessee out of possession, but the vendee in such case must bring his ejectment. 2 Show. Rep. 85. pl. 74. [He cannot perhaps where there is a tenant in possession, and the execution is against the landlord, whose term is to be sold, turn the tenant out of possession: but the case might be very different, where *the debtor himself* is in possession. In the case in Shower, the proceeding was under the statute for a forcible entry, which by no means negatives the power of the sheriff to put the tenant out of possession peaceably. Taylor v. Cole, 3 Term Rep. 292.]

Cro. Eliz. If the sheriff, reciting that the defendant hath a term for years, 534. 4 Co. sells it by virtue of a *fi. fa.*, this sale is good; for it cannot be intended that the sheriff should certainly know the beginning and end of the term.

Taylor v. [So, in pleading the taking of a term under a *feri facias*, it is sufficient to state, that the party was possessed of a certain interest in the residue of a certain term of years.] Cole, 3 Term Rep. 292.

4 Co. 74. a. But, if undertaking to recite it, he mistakes, and sells the said term, it is a void sale, unless there be general words, all the interest, &c. of the defendant therein.

4 Co. 74. a. But a term cannot be extended without shewing the certainty thereof, because after the debt paid the party is to have his term again if any part thereof remains.

(c) It cannot be done by the sheriff without an inquest, for the words of the statute are *per rationabile pretium et exitum*, which must be found such by the oaths of twelve men. 2 Inst. 396. Co. Lit. 389. Dyer, 100. 5 Co. 74.

And although the creditor takes out an *elegit*, yet, if it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, he ought not to extend the lands. only is not a *fi. fa.*; for a *fi. fa.* is executed by sale by the sheriff, but the *elegit* by the appraisement of the goods by the jury, and delivery to the party. Sid. 184. Lev. 92. Keb. 105.

2 Inst. 395.  
— But an *elegit* executed upon goods

When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff (a) by metes and bounds. Sheriff delivereth a moiety of an house without metes and bounds, such return is ill, and shall be quashed for uncertainty. Carth. 453. per Holt.

Cro. Car. 319.  
(a) If upon an *elegit* the

If the sheriff on an inquisition upon an *elegit* returns the defendant to have twenty acres in *Dale*, and twenty acres in *Sale*, and delivers the twenty acres in *Sale* for the moiety of the whole, all is void, for he ought to deliver a moiety of the twenty acres in each vill; and this may be avoided in evidence in ejectment brought for the lands \*.

Lev. 160.  
Sid. 239.  
\* Extent not avoided by omission of lands liable, 16 & 17 Car. 2. c. 5. § 2.

The sheriff on an *elegit* may extend a (b) rent-charge; for the word *land*, which is made subject to the execution, includes all hereditaments extendible; and in this case the party may distrain and avow for the rent though the tenant never attorned; for the law, creating his estate, gives him all means necessary for the enjoyment of it.

Moor, 32.  
pl. 104.  
(b) But not a rent-secck.  
Cro. Eliz. 656.—  
Nor can the office of fi-

lazer be extended, for a man shall not have execution of that which he cannot assign, though he may of this have an assise, *ut de libero tenemento*. Dyer 7. pl. 10.

Lands in (c) ancient demesne upon an *elegit* may by the sheriff be delivered in execution, because the title of the land is not directly put in plea in the king's court; (d) but the statute of *Westm.* 2. (13 Ed. 1. §. 1.) which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or consent.

(c) Hob. 47.  
4 Inst. 270.  
2 Inst. 397.  
Moor, 211.  
pl. 351.  
Brownl. 234.  
(d) 3 Co. 9.  
Co. Cop. 149. Salk. 368.

If one be tenant for years without impeachment of waste, and a *fi. fa.* come out against him, the sheriff cannot cut down and fell timber; for the tenant had only a *power* so to do, and no interest, as he hath in standing corn, which upon a *fi. fa.* against him the sheriff may sell.

Salk. 368.

Upon the writs of *habere facias seisinam* and *possessionem*, the seisin or possession is usually performed by the sheriff by delivering the party, who recovers, a twig, bough, clod, &c. of the land, or, if it be of an house, by the delivery of the ring of the door, &c.

Dalt. Sh. 254.  
Bro Seisin, 7, 14, 30.

But, though this ceremony be used, yet it is held, that in (e) all cases where the writ demands land, rent, or other thing in certain, the demandant after judgment may enter or distrain before any seisin delivered him by the sheriff.

Co. Lit. 34.  
b.  
(e) Upon a recovery or a conversion, common,

&c. that lie in grant, the recoveror is not in possession until execution, entry, or claim. Co. 94 b. 97. b. 106. b. Moor, 141. Kellw. 108.

Co. Lit. 34.

b.

(a) In dower the writ was *de tertia parte refflorie de D.* and upon that the grand cape issued,

*Cape in manum nostrum tertiam partem refflorie*, by colour of which the sheriff took the tithes severed from the nine parts, and carried them away with him; and it was agreed by the justices, that the same is not such a seizure as is intended by the said writ, but the sheriff by virtue of such writ ought generally to seize, but leave them where he found them; and the court was of opinion to commit the sheriff for such his misdemour. Leon. 92.

Roll. Abr.

664.

Where the execution is in the generality without mentioning any thing in particular, the sheriff is to make execution of the right thing at his peril, otherwise he will be a disseisor; for he is bound to take notice thereof, and he hath no warrant from the court but to make execution of the right thing.

Dyer 265.

pl. 5.  
Dalt. Sh.  
265.

*A.* and *B.* tenants in common of a manor, *A.* purchased several freeholds that lay so mixed with the demesne lands of the manor, that they could hardly be distinguished from them; *B.* brings a writ of partition of the manor only; and it was adjudged that partition should be made, and a writ awarded accordingly; upon the execution of which writ *A.* comes to the sheriff and inquest, and acquaints them with the purchase of the freeholds that are not parcel of the manor, and bids them take care how they make partition of all the lands within such a compass, lest they offer violence to their consciences, but does not shew them the freeholds distinctly, nor the limits of the manor; which obliged the sheriff to adjourn to a certain day; on which one of the inquest made default, and thereupon the sheriff returns a fine of 40 s., with an account of the difficulties they met with, *et ulterius propter brevitate[m] temporis breve illud exequi non potuit*. It was held, that *A.* ought to shew the bounds of the several freeholds that he purchased, or the number of the acres; but if no light or evidence is given by either party to the inquest, and they make partition *de tanto quantum presumitur et dignoscitur per presumptiones*, it is good, for they are under an obligation to execute the commands of the court at their peril.

Keilw. 119.

Bro. tit.

Trespas, 99.

[(b) This inquisition, it seems, the courts cannot set aside.

Roberts v.

Thomas,

6 Term Rep.

38.]

(c) Dalt. Sh. 146.

Bro. Pledges,

28.

Cro. Car.

149. Rol.

Abr. 893.

[Tully v. Peachey, Hil. 23 Geo. 3. 4 Term Rep. 640.] (d) Show Rep. 174. [4 Term Rep. 640.]—Unless such first execution were by fraud. 7 Mod. 37. [or the goods were not legally seized, 4 Term Rep. 651.]

The sheriff cannot take in execution goods pawned or gaged for debt, nor goods demised or letten for years, nor goods distrained, (d) nor goods before seized upon an execution.



Farr v.  
Newman,  
4 Term Rep.  
621.

[How far the sheriff is justifiable in seizing the goods of a testator in the hands of his executor in execution of a judgment against the executor in his own right, hath been very amply discussed in a late case. It was an action against the sheriff for a false return to a *feri facias*. The special verdict stated, that in *Easter* term 30 G. 3. the plaintiff's recovered against *W.* and *R.* and *A.* his wife, executors of *L.* 236*l.* 10*s.*; and on 17th *May*, 30 G. 3. sued out a *fi. fa.* to levy that sum of the goods and chattels which were of *L.* in the hands of the executors to be administered. That on the 28th *May* 1790 the writ was delivered to the defendants, then sheriff. That in *Easter* term 1790 *B.* recovered against *R.* 1047*l.* debt, and 63*s.* damages and costs; which judgment was signed 27th *May* 1790. That on 28th *May* 1790 *B.* sued out a *fi. fa.* on that judgment, tested the 17th *May*, which writ, on the 28th *May* 1790, and a few hours before the delivery of the plaintiff's writ, was delivered to the sheriff, who under that writ, a few days before the delivery of the plaintiff's writ to him, seized goods in an house wherein *R.* and his wife resided, and in which house the testator at his death did reside; and which goods were the testator's. That on the same 28th *May* 1790, after the sheriff had seized the goods, the attorney for the plaintiff gave notice to the attorney for *B.* and also to the sheriff, that the goods so seized were the goods of the testator in the possession of *R.* and his wife, as executors, liable to the payment of the debt recovered by the plaintiffs, and also liable to the payment of 116*l.* recovered by one *S.* and not liable to the payment of any debt of *R.*, the same not being sufficient to satisfy the said judgments and other debts of the testator; and that the said attorney meant to take out executions on the said judgments; and unless they quitted possession, actions would be brought against them. That afterwards, on the said 28th *May* the attorney for the plaintiff procured a warrant from the defendants, then sheriff, on the writ of *fi. fa.* mentioned in the declarations, which warrant was on the same day delivered to the officer to be executed. That the officer went with the warrant to the house where the goods were before they were sold, but did not levy thereon; and the sheriff afterwards returned *nulla bona* to that writ, and that by means of the premises, the plaintiffs were hindered from recovering their damages and had lost the same. In this case, three judges, *viz.* Lord *Kenyon*, Ch. J., *Ashurst* and *Grese*, J., were of opinion, that the plaintiffs were entitled to judgment. But *Buller*, J., *contra*, for that the property in the goods, after the testator's death, is vested in the executors, who may grant, alien, give, or release them; that the execution in this case was equivalent to a sale, which it was admitted would be good; and that as to the notice, if the sheriff acted legally in seizing the goods, he was bound to proceed in the execution; and a subsequent notice would not make that unlawful, which was lawful at the time: if the seizure were unlawful, the sheriff was liable to an action without any notice at all; and if it were not unlawful, no notice could make it so; that the

notice in such case was a perfect novelty, unknown to the common law, with regard to any effect which it could have.]

Salk. 395. Upon a *levari fa.* to levy the yearly value of 55 *l.* found by inquisition on an (a) outlawry upon a judgment in debt, the beasts of a stranger *levant* and *couchant* on the land may be taken, for they are the issues of the land; and were it otherwise, it would be in the power of the party by agisting his lands to defeat the king of the benefit of the outlawry.

Briton v. Cole. (a) But, where on a *fi. fa.* out of the Exchequer for the Queen's debt, the sheriff took the beasts of *J. S.* being *levant* and *couchant* on the land of the debtor, and sold them, this in an action of trespass was held not to be lawful; but it was held that they might have been distrained for the queen's debt. Cro. Eliz. 431. Rol. Abr. 159. *et vide* Hard. 101.

Salk. 392. If there are two coparceners of goods, and a judgment is given against one of them, the sheriff upon a *fi. fa.* upon this judgment must seize all, because their moiety is undivided; for if he seizes but a moiety, and sells that, the other coparcener will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided; so that the vendee will be tenant in common with the other partner.

Cro. Jac. 78. A person had an annuity for twenty-one years granted by Queen Elizabeth, payable by her receiver of her court of wards, which upon a *fi. fa.* upon a judgment against the grantee was extended and sold; and it was resolved the extent and sale was good; for being an annuity certain for years certain, and payable by the receiver, it is in nature of a rent-charge for twenty-one years, and is grantable over and vendible, and not like an annuity which chargeth the person only.

2 Co. 12. On a writ of *fi. fa.* the whole personal estate is liable to execution, except wearing apparel; and it hath been held, that (b) if the party hath two gowns the sheriff may sell one of them.

Cro. Eliz. 504. Upon a writ of *fi. fa.* the sheriff cannot (c) deliver the goods of the defendant to the plaintiff in satisfaction of his debt, but the goods are to be sold, and the money in strictness is to be (d) brought into court.

S. P. — Where a sheriff after a *fi. fa.* delivered to him pays the plaintiff out of his own money, it is made a question by Hobart, whether the sheriff may levy the money on the defendant. Hob. 207. (c) Though they cannot be delivered to the plaintiff, they may be sold to him. Comb. 452. Admitted to be the practice to make a bill of sale of the goods to the plaintiff. Carth. 419. [But, though such be the practice, it is not part of the duty of the sheriff to execute a bill of sale to the plaintiff at an appraised value, nor is he compellable to do so, though he even promise it. For this might be very inconvenient and highly injurious if it were allowed. The legal and proper mode of compelling a sale by the sheriff, where he makes delay or refuses, is by writ of *venditioi exponas*; upon which he must return the money into court. Cameron v. Reynolds. Cowp. 406.] — But the sheriff, though he pays the plaintiff out of his own proper money, yet he cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. Noy, 107. Lutw. 589. (d) For it is not of record without. Godb. 147. — But the law seems otherwise; for though the writ be *ita quod habeas*, &c. yet the sheriff may return that he hath paid the money to the plaintiff. 2 Show. Rep. 87. pl. 78. 3 Lev. 204.

Salk. 320. If two writs of *fi. fa.* bear teste the same day, the sheriff at common law, and now since the statute (e) 29 Car. c. 3. is bound to execute that which was first delivered to him.

(e) By which it is enacted, that no *fi. fa.* or other writ of execution shall bind the property of the goods, but from the time such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and for the manifestation of the time, the sheriff, &c. their deputies and agents, upon the back of the said writ shall indorse the day and year when

When received. — This must be intended as to strangers who might have a title to the goods between the teste of the writ and delivery thereof to the sheriff, but as to the party himself, his executors and administrators, the goods since the statute, as before, are bound from the teste. 2 Vent. 218. Comb. 33. 2 Show. 485. 6 Mod. 225.

Where since the statute *A.* delivered a *fi. fa.* to the sheriff at nine in the morning, and after at ten the same day *B.* delivered another, desiring him forthwith to execute it, which he did, and sold the goods, and after executed *A.*'s *fi. fa.* on the same goods, it was held the first execution was good, and *A.* had remedy only by action against the sheriff. Salk. 320. pl. 4. Ld. Raym. 251. Carth. 419. Smalcom v. Bucking- ham. 5 Mod. 376. S. C. Comb. 428. S. C. and Holt inclined there should be no fraction of a day, and that the sheriff had his election, Carth. 419. S. C. the last bearing teste first; and per Holt, where a *fi. fa.* is delivered the sheriff to-day and another to-morrow, and he executes the last first by making sale of the goods, such sale will stand good, and he who delivered the first writ hath remedy only by action against the sheriff. — But, if two writs are delivered the sheriff the same day; he ought to give preference to that which was first delivered; but, if he executes the last first, the execution cannot be defeated by a subsequent execution of the first, but the party concerned in the first is put to his action against the sheriff. [And agreeably to this doctrine two modern cases have proceeded; that where a *feri facias* is delivered to the sheriff, and the officer has levied the debt, and made a bill of sale, it shall have priority of a former execution in the office; Rybot v. Peckham, M. 19 Geo. 3. B. R. 1 Term Rep. 731. in notes; and when two writs of *feri facias* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were actually made under the subsequent execution. Hutchinson v. Johnston, 1 Term Rep. 729.]

But, if *A.* when he delivered his writ, had ordered the sheriff to stay execution till the next day, he could have had no action against the sheriff. Salk. 320. pl. 4. Ld. Raym. 251.

[The sheriff is not liable for seizing goods in execution after an act of bankruptcy; but, if he sells them after the commission issues, trover will lie.] Cooper v. Chirry, 1 Burr. 20.

## (O) Of his Duty in admitting Persons to Bail, and herein of Securities taken for Ease and Favour.

THIS depends chiefly on the statute 23 H. 6. cap. 9. before which the sheriff was not obliged to take bail, unless the party sued out a writ of mainprize; but he might have taken bail on his own head, and if he had not the body ready according to his return, he was amerced, as he now is, if the plaintiff does not take an assignment of the bail-bond. Dalt. Sh. 356. et vide head of Bail.

This statute hath been always deemed an excellent law, as it frees debtors and secures them from the oppression of sheriffs and their officers, and at the same time prevents such officers from admitting persons to bail not bailable by law, to the prejudice of just creditors; and for this purpose it is enacted, "That sheriffs, " under-sheriffs, and other officers and ministers, shall let out of " prison all persons in their custody by force of any writ, bill, " or warrant, in any action personal, or by cause of indictment " of trespass, upon reasonable surety of persons having sufficient " within the counties to keep their days, (persons in ward by re- demption, execution, *capias utlagatum* or *excommunicatum*, surety " of the peace, and all persons committed by special command- ment of the justices except,) and no sheriff nor his officers shall " take any obligation for any cause aforesaid, or by colour of their " office,

“ office, but only to themselves, nor by any person which shall  
 “ be in their ward by course of law, but by the name of their  
 “ office, and upon condition written that the said prisoner shall  
 “ appear at the day contained in the writs, bill, or warrant; and  
 “ if any sheriffs or officers aforesaid take any obligation in other  
 “ form by colour of their office, it shall be void.— And all  
 “ sheriffs, &c. who (a) do contrary to this ordinance, shall lose to  
 “ the party grieved his treble damages, and shall forfeit 40 l.”

(a) Cro. Eliz.  
 7<sup>h</sup>, 77.  
 Dalt. Sh.  
 355. and  
 the authori-  
 ties *infra*.

On the first branch of this statute it hath been adjudged and admitted in a variety of books and cases, that the sheriff is obliged, in such cases not excepted by the statute, to admit the party to bail, and that if he refuses, an action lies against him by the party injured.

Roll. Abr.  
 93. Cro.  
 Eliz. 852.  
 Noy, 39.  
 S. C.  
 Bowles v.  
 Lafiel.  
 (b) For the  
 return in ef-  
 feet and  
 construction  
 of law is true.

And as he is obliged to admit the party to bail, hence also it hath been adjudged, that if the sheriff return (b) *cepi* on mesne process, *et paratum habeo*, no (c) action lies against him, nor will the court grant an attachment in such case against the sheriff where he had bailed the party; for this he was obliged to do by the statute; and therefore if he is mistaken in his sureties, he is not to suffer in his liberty. So, (d) if the sheriff return *languidus*, where he admitted the party to bail, no action lies against him.

Mod. 224. 2 Mod. 83. (c) But in this case the defendant must not demur to the declaration, but must plead the statute. Moor, 428. pl. 596. Cro. Eliz. 400. 2 Keb. 391. Sid. 439. Mod. 57. Vent. 85. 2 Saund. 135.—or upon not guilty may give it in evidence. Sid. 439. Mod. 58. Vent. 85. (d) Noy, 39. Cro. Eliz. 852.

Roll. Abr.  
 307.

But, if the sheriff returns a *cepi corpus* and *paratum habeo*, or *languidus*, where the defendant is at large, without any bail taken, he is not aided by the statute, but an action lies against him for the false return.

Vent. 85.  
 Salk. 99.  
 pl. 6.  
 6 Mod. 122.  
 2 Saund. 59.  
 Ed. Raym.  
 435.  
 [(e) If the  
 plaintiff dis-  
 likes the se-  
 curity, he  
 should not  
 take an af-  
 firmation of  
 the bail-  
 bond; for  
 by so do-  
 ing, e dis-  
 charges the  
 sheriff.  
 Gibb C. P.  
 21  
 1 Salk. 99.  
 1 Will. 223.  
 Williams  
 and Jacques,  
 vol. 24 G. 3.  
 Pr. 153.]

The party, at whose suit the arrest was, may either take an affirmation of the bail-bond (which he may now sue in his own name,) or, if he dislikes the security (e), he may still move to amerce the sheriff; for, the sheriff having returned a *cepi corpus*, it is a breach of duty in him not to bring him in according to his return, for which the court amerces him as one of their officers who has been disobedient to their writ; and because the disobedience is to the writ which is returned and filed, the court amerces him, because it appears on record he has disobeyed the king's writ. But, if the writ be not returned, and the court make an order that the sheriff shall return his writ in four days, as is usual, there, the disobedience is to the pronounced order of the court, and consequently a contempt of the court, for which an attachment lies. But, if it be in another term, then there must be a *habeas corpus* upon a *cepi* returned, because the sheriff might be prepared to have him according to his writ the first term; but not being required to have him in court the second term, an *habeas corpus* is necessary, and the sheriff on this writ must return the body, or a *languidus*, or a *mortuus*, else he will be amerced.

but, if the same bail be put in above, he cannot afterwards except against them. Tidd's

If a sheriff takes an obligation with (a) one surety only, it is good enough, and not void by the statute. Cro. Eliz. 808. adjudged in Sir

William Drury's case. 10 Co. 100. S. C. cited. (a) May take one, two or more, according to his discretion. Cro. Jac. 286.

So, in debt upon an obligation conditioned for the appearance of one arrested on a *capias*, the defendant pleaded, that the plaintiff took the obligation from him and a stranger who had nothing, and who did not inhabit within the county, and pleaded the statute 23 H. 6. cap. 9. and insisted that for this cause the obligation was void: but upon demurrer to this plea it was held, that this statute was made for the ease of the party to prevent oppression, and the sheriff's insisting upon unreasonable securities; but that it did not alter the law as to the matter of those securities, which the sheriff was still at liberty to take in what manner he pleased, so that he did not vary from the manner prescribed by the statute, or make them oppressive to the party; and here his taking the security in a less strict manner than he might have insisted upon, can be no foundation for the party to make it void. Cro. Eliz. 808. Sir George Clifton v. Webb. 2 And. 175. Moor, 636. Cro. Eliz. 802. Like point adjudged between Cotton v. Vale.

It is said, that there are only three forms to be observed within this statute: 1st, That the bond be made to the sheriff himself; 2dly, That it be made to him by the name of his office; 3dly, That it be only for the party's appearance at the day. Cro. Eliz. 862. That it be made to him only by the name of his office,

and ought to express the day and place of the party's appearance; and these circumstances being observed, although it be variant in others, it is not material. Cro. Jac. 286. and Dyer, 119. S. P.

An obligation made to a deputy of a bailiff of a franchise, or to an under-sheriff's deputy, is void by the 23 H. 6. cap. 9. for it ought to be in the name of the bailiff or sheriff himself. Noy, 69. Taverner's case.

The condition of an obligation to save the sheriff harmless on his admitting persons to bail who are not bailable by law, is void by the common law. Plowd. 67. Dive v. Manningham. 10 Co. 100. b. S. C. cited.

If the sheriff, for the ease and enlargement of a prisoner takes a promise to save him harmless, this is within the statute, being within the same mischief, though the statute speaks only of bonds. Also, such promise is void by the common law. 10 Co. 101.

On an attachment for a contempt the sheriff cannot take bail, and such contempts are only bailable by the judges of the court from whence the process issued, being in nature of executions; but on an attachment out of Chancery, for want of an answer, the sheriff may bail, being only attachments of process (a). And herein it seems settled, that if the sheriff take one upon an attachment of process, he is to give a bond of 40 l. penalty to the sheriff to appear and answer; but, for one taken up in execution after a decree, the sheriff may insist on security proportionable to the duty; but in both cases, on the registrar's certificate that the party has appeared, the sheriff is to deliver up the bond. M. 9 G. 2. The King v. Baker-ville, Sheriff of Shropshire; & vide 2 Salk. 608. Sill. 251. Abr. Cal. Fg. 351. [(a) But, though the sheriff may perhaps bail

in such case, he is clearly not bound to do so; nor will an action lie against him on the above statute for refusing to do so; that statute referring only to process in courts of law. Studt v. Aston, 1 H. Bl. 468.]

An obligation taken by the sheriff of one arrested by virtue of an attachment under the privy seal of the court of requests, was held Cro. Eliz. 646. Stepany v.

Loyd; &  
vide 2 And.  
122, S. C.

held not to be within the statute; but it was held, that such bond was voidable by duress, such court not having jurisdiction to issue such process, and consequently it could be no warrant to the sheriff to take the body or the obligation. But it was admitted in this case, that the sheriff ought to obey the process out of the court of wards and duchy court.

Gro. Eliz.  
745.  
Brown v.  
Adams.

So, if one be arrested in one county, and carried by the bailiff into another, where he gives bond to the sheriff of the county where the arrest was, although this is not void within the statute, yet the party may avoid it for duress; but then he must plead such duress, and rely on it.

10 Co. 99. b.  
Brawlage's  
case.

(a) If one  
taken on a  
*capias ad fa-*

*ci faciendum* at the suit of A. assigns a mortgage to the under-sheriff for securing the money to him at a certain day, and is thereupon discharged, and after a new sheriff made he pays the money to the under-sheriff, who re-assigns the mortgage, yet this shall not excuse the escape, for the sheriff had no power to take security, or even the money. Lutw. 588 599. But for this vide Gro. Eliz. 404. Mod. 194. 2 Jon. 97. 2 Lev. 203. 3 Keb. 743. 2 Show. 139. pl. 116.

10 Co. 100.

a.  
(b) That the  
king is not  
bound by the statute.

An obligation taken by the sheriff *pro solutione pecunie debite* (b) *domina regina*, on an extent out of the Exchequer, is not within the statute.

Dyer, 119. 5 Co. Whelpdale's case.

10 Co. 100.

b. {But  
the sheriff's  
power of  
taking a  
bond under  
this act upon

On an indictment of trespass, in which the sheriff is obliged by the statute to admit to bail, yet, if the bond is taken in (c) another's name it is void, as varying from the form prescribed by the statute, which requires that it should be in the sheriff's own name.

an indictment found before himself at his tourn was taken away by 1 Edw. 4. c. 2. and upon indictments found in any other courts has been denied in a late case by all the judges except Eyre, C. J. Bengough v. Rossiter, 4 Term Rep. 605. 2 H. Bl. 418.] (c) If the sheriff takes bond in another's name to elude the statute, such bond is void. 2 Mod. 305.

2 Mod. 304,  
305. Hall  
v. Carter.

But, where in debt on an obligation the defendant craved oyer of the condition, which was, that if another person (who was arrested at the suit of the plaintiff, and for whom the defendant was now bound) should give security, as the plaintiff should approve of, for the payment of 90 l. to him, or should render his body to prison at the return of the writ, then the obligation to be void; this statute was pleaded, but adjudged not to be within the statute.

2 Jon. 95.  
2 Mod. 305.  
cited.

(a) The statute doth  
not extend  
to a bond  
given to the  
plaintiff  
himself.  
Allen, 58.

So, if a *capias* be taken out against the defendant, and a third person give the plaintiff a bond that the defendant shall pay the money, or render himself at the return of the writ, it is a good bond, and not within the statute, because it is not by the direction of the officer, but by the agreement of the plaintiff; and there is no law that makes the agreement of the (d) parties void; and if the bond was not taken by such agreement, it might have been traversed.

[Where the under-taking is given to the sheriff, the form directed by 23 H. 6. c. 9. must be strictly pursued, and therefore, an agreement in writing to put in good bail for a person arrested on *mesne* process

at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the sheriff's officer, in consideration of his discharging the party arrested, is void. But, where the undertaking is given to the plaintiff, it is not within the statute; and therefore the undertaking of an attorney for the appearance of a defendant is not void, because it is given to the plaintiff in the action and not to the sheriff. *Rogers v. Reeves*, 1 Term Rep. 418.]

Bond taken by the (a) serjeant at arms attending the House of Commons not within the statute, but being for ease and favour is void by the common law. *Hard. 464. Keb. 391.*

(a) Bond taken by the marshal of the Queen's Bench for the easement or delivery of a prisoner in execution, is void by the statute, although he be not named in the statute. *Cro. Eliz. 66. 3 Keb. 71. S. P.* — But a bond to the serjeant at arms attending upon the president and council of the marches of Wales is not within the statute. *Cro. Car. 309. Johns v. Stratford.\** — \* *Sed qu.* if not void by the common law, according to the case in the text?

If A. be taken on a *capias ad satisfaciendum*, and escape, and be after retaken, and for his enlargement give a bond to the gaoler, this is within the statute. *2 Leon. 119.*

If a *capias* be awarded against B. and (b) before the arrest the sheriff take an obligation of him for his enlargement, this by special pleading may be avoided by force of the statute 23 H. 6. c. 9. *Noy, 43. Sid. 151. 456. S. P. seems contr.*

(b) So, if after the return. *Sid. 301.*

If the condition of a bond be to be a true prisoner, and (c) to pay so much by the week for chamber-rent, this is void by the statute; but *Hale* said, that a bond for true imprisonment is good *prima facie*, but that the defendant may (d) aver that it was also for ease and favour. *Vent. 237. Raym. 222. S. C.*

(c) If the sheriff adds to the condition, that the party shall be a true prisoner, that he shall pay for his meat and drink, this makes the obligation void. *10 Co. 100. b.* (d) If the obligation be for the payment of money generally, yet the defendant may aver that it was for ease and favour, in the same manner as an obligor may in the case of simony or usury. *Carth. 301. Hard. 464.*

If a sheriff take a bond for a point against law, and also for a due debt, the whole bond is void; for the letter of the statute of 23 H. 6. c. 9. is so; and a statute is a strict law; but the common law doth divide according to common reason, and having made that void which is against reason, lets the rest stand. *Hob. 14. Vent. 237. Carter, 229.*

It is now (e) settled, that though the statute makes such bonds void, yet are they not *ipso facto* so, but must be avoided by special pleading. *Dyer, 116. Sid. 22. 2 Saund. 154.*

(e) It was formerly held by Roll and Glin that it was a general law, of which the judges were to take notice *ex officio*, but since held otherwise. *Lev. 86.* [But see *contra*. 2 Term Rep. 569. *Samuel v. Evans.*]

The defendant pleaded the statute of 23 H. 6. c. 9. and that he was attached and in custody, and that the bond was made for his enlargement, and so not his deed; whereupon the plaintiff demurred specially upon the conclusion of the plea, which ought to be, judgment *si actio*, &c. and therefore the plea naught; and it was so agreed by the court. *Allen, 58. Leech v. Davys.*

In pleading this statute, the defendant must recite it truly. *Cro. Eliz. 108. pl. 4. Sid. 351.*

[A party grieved who recovers damages against the sheriff for not taking bail under this statute, is entitled to his costs: for before the statute, if the sheriff would not bail the party arrested, the latter

ter had a remedy against him; and wherever a statute subsequent to the statute of *Gloucester* gives a remedy, where damages were sustained before, there, the party shall have his costs.]

## Simony.

**SIMONY**, so called from *Simon Magus*, is the buying or selling of holy orders, or an ecclesiastical benefice.

The words ecclesiastical benefice, comprehend every ecclesiastical dignity and promotion.

As by the purchase of ecclesiastical benefices worthy and learned men may be kept out of the church, and a door may, to the great scandal of religion and prejudice of morality, be opened to persons by no means qualified to discharge the duties of the sacred function, it is of the utmost consequence to society, that it be prevented. With a view to this, canons were anciently made, by which a very strict oath was enjoined; and the purchaser of an ecclesiastical benefice was punished with deprivation, or disability, as the case might require.

[(a) Simony, as such, was unknown to the common law; though I agree that corrupt presentation was. *Burnett's Past. Care*, 22. But what is or is not

It has been said, that simony was no offence at the common law (a); and the case of *Gregory v. Oldbury, Moor*, 564. has been as to this point relied upon. It is laid down in that case, that a bond to pay money upon a simoniacal contract is good, because simony is no offence at the common law. But, by attending to what is laid down in other books, it will appear, that although simony *eo nomine* be not an offence, either at the common law or against the statute, for the word simony is not therein contained, a corrupt bargain for presenting to a benefice, is an offence at the common law.

simony now depends on the statute of 31 Eliz. c. 6. which did not adopt all the wild notions of the canon law; but has defined it to be a corrupt agreement to present. In Co. Entr. 516, it is expressed *simoniâ et corruptè*; but the latter is the legal and effective word. *Per De Grey, C. J.* 2 Bl. Rep. 1054.]

In 1 *Inst.* 17. b. such corrupt bargain is said to be so detestable in the eye of the common law, that a plaintiff in *quare impedit* could not before the statute of *Westm.* 2. recover damages for the loss of his presentation, it being considered as a thing of no value. In 1 *Inst.* 89. it is said, that a guardian in socage could not present to an advowson in right of his heir; because, as he could take nothing for the presentation, he could not bring it to account.

This doctrine is confirmed in 3 *Inst.* 156. and it is added, that simony is the more odious to the common law, because it is ever accompanied with perjury; the presentee being sworn to commit no simony.

In *Macaller v. Todderick, Cro. Car.* 353. it is said, that simony has, by the law of God and of the land, been always accounted a great offence.



In *Winchcomb v. Pulleſton*, *Hob.* 167. it is laid down, that a bond upon a ſimoniactal contract is againſt law, becauſe it is given upon a contract *ex turpi cauſa*, and *contra bonos mores*; nay, that it is as void as an uſurious bond, which if an executor pay, he is guilty of a *deſpectavit*.

In *Carth.* 252. *Bartlett v. Vinor*, ſuch bond is ſaid to be void, as being againſt law, although it be not ſo declared by the ſtatute.

Other authorities might be added; but theſe are ſufficient to ſhew, that a corrupt bargain for preſenting to a benefice is an offence at the common law.

As neither the conſideration of the greatneſs of the offence of ſimony, nor the proviſion made againſt it by the canon or common law, was ſufficient to put a ſtop to this offence, it was at length prohibited, under very ſevere penalties, by the 31 *Eliz.* c. 6.

Under this head it will be proper to conſider,

- (A) In what the Offence of Simony conſiſts.
- (B) How far a Bond for reſigning a Benefice is good at Law.
- (C) Of the Power exerciſed over a Bond for reſigning a Benefice by Courts of Equity.
- (D) Whether the Penalty of a Bond for reſigning a Benefice be ſaved, where the Ordinary has reſuſed to accept a Reſignation.
- (E) Some Objections to a Bond for reſigning a Benefice conſidered.
- (F) Of the Forfeitures, Diſabilities, and Punishments, incurred by Simony.
  1. By the Incumbent.
  2. By the Patron.
  3. By the Ordinary.
- (G) In what Caſes, and at what Times, Advantage may be taken of the Forfeitures and Diſabilities incurred by Simony.
  1. By the King.
  2. By other Perſons.
- (H) Of the Jurisdiction of Spiritual Courts in Simony.

(I) Of

(I) Of the Pleadings in an Action upon the  
31 *Eliz. cap. 6.*

## (A) In what the Offence of Simony does consist.

**I**T has already been observed, that simony is an offence at the common law: but, as much the greater part of the determinations, as to what is simony, are founded upon 31 *Eliz. c. 6.* and some paragraphs of that statute not only contain a description of the offence, but likewise ordain what forfeitures and penalties shall be incurred, and who may take advantage thereof, it will be proper to recite the whole paragraphs in this place, and afterwards to refer to them: and as frequent mention will, in treating of this subject, be made of the oath against simony, that oath shall be likewise recited.

Every person, presenting for corrupt consideration, to forfeit the next turn; and every person, giving or taking any thing for a presentation, to forfeit the double value, and the pretences to be incapable of enjoying the benefice.

By § 5. it is enacted, “ That if any person or persons, bodies politick and corporate, shall for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction, thereupon shall be utterly void, frustrate, and of no effect in law; and that it shall and may be lawful for the queen, her heirs and successors, to present, collate unto, or give or bestow, every such benefice, dignity, prebend, and living ecclesiastical, for that time or turn only; and that every person or persons, bodies politick and corporate, that shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year’s profit of every such benefice, dignity, prebend, and living ecclesiastical: and the person so corruptly taking, procuring, seeking, or accepting, any such benefice, dignity, prebend, or living, shall, thereupon and from thenceforth, be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical.”

Every person corruptly instituting to a benefice to forfeit the double value; and the benefice to be void.

By § 6. it is enacted, “ That if any person shall, for any sum of money, reward, gift, profit, or commodity, other than for usual and lawful fees, or for or by reason of any promise, agreement, grant, covenant, bond, or other assurance, of or for any sum of money, reward, gift, profit, or benefit, directly or indirectly, admit, institute, instal, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or living ecclesiastical: that every person so offending shall forfeit and lose the double value of one year’s profit of every  
“ such

“ such benefice, dignity, prebend, and living ecclesiastical ; and  
 “ that, immediately from and after the investing, installation, or  
 “ induction, thereof had, the same benefice, dignity, prebend,  
 “ and living ecclesiastical, shall be estfoons merely void ; and the  
 “ patron or person, to whom the advowson, gift, presentation, or  
 “ collation shall by law appertain, shall and may by virtue of this  
 “ act present or collate unto, give and dispose of the same bene-  
 “ fice, dignity, prebend, or living ecclesiastical, in such sort, to all  
 “ intents and purposes, as if the party so admitted, instituted,  
 “ installed, invested, inducted, or placed, had been or were na-  
 “ turally dead.”

By § 7. it is provided, “ That no title to confer or present by  
 “ lapse shall accrue to any voidance mentioned in this act, but  
 “ after six months next after notice given of such voidance by the  
 “ ordinary to the patron.”

No lapse to  
 be till after  
 six months’  
 notice to the  
 patron that the benefice is void.

By § 8. it is enacted, “ That if any incumbent of any benefice  
 “ with cure of souls shall corruptly resign or exchange the same,  
 “ or shall corruptly take for or in respect of resigning or exchange-  
 “ ing the same, directly or indirectly, any pension, sum of money,  
 “ or benefit : that then as well the giver as the taker of any such  
 “ pension, sum of money, or other benefit corruptly, shall lose  
 “ double the value of the sum so given, taken, or had. ‘ The one  
 “ moiety, as well thereof, as of the forfeiture of double value of  
 “ one year’s profit before mentioned, to be to the queen’s majesty,  
 “ her heirs and successors, and the other moiety to him or them  
 “ that will sue for the same, by action of debt, bill, or inform-  
 “ ation, in any of her majesty’s courts of record.”

The giver or  
 taker of mo-  
 ney for re-  
 signing or  
 exchanging  
 a benefice to  
 lose double  
 the sum.

By § 9. it is provided, “ That nothing in this act shall in any  
 “ wise extend to take away, or restrain, any punishment, pain, or  
 “ penalty, limited, prescribed, or instituted by the laws ecclesi-  
 “ astical, for any the offences before in this act mentioned,  
 “ but that the same shall remain in force and may be put in exe-  
 “ cution, as it might be before the making of this act.”

The penal-  
 ties of the  
 ecclesiastical  
 laws not  
 taken away  
 by this act.

By § 10. it is enacted, “ That if any person or persons shall at  
 “ any time receive or take any money, fee, reward, or any other  
 “ profit, directly or indirectly, or shall take any promise, agree-  
 “ ment, covenant, bond, or other assurance, to receive or have any  
 “ money, fee, reward, or any other profit, directly or indirectly,  
 “ either to him or themselves, or to any other of their or any of  
 “ their friends, ordinary and lawful fees only excepted, for or to  
 “ procure the ordaining or making of any minister or ministers,  
 “ or giving of any orders, or licence or licences to preach : that  
 “ every person and persons so offending shall for every such of-  
 “ fence forfeit and lose the sum of forty pounds of lawful money  
 “ of *England* ; and the party so corruptly ordained or made mini-  
 “ ster, or taking orders, shall forfeit and lose the sum of ten  
 “ pounds ; and if at any time, within seven years next after such  
 “ corrupt entering into the ministry, or receiving of orders, he  
 “ shall accept or take any benefice, living, or promotion ecclesi-  
 “ astical, that immediately from and after the induction, investing,  
 “ or installation thereof, or thereinto had, the same benefice,  
 “ living,

The taker of  
 money to  
 procure or  
 give orders  
 to forfeit  
 forty  
 pounds, and  
 the party so  
 ordained to  
 forfeit ten  
 pounds ; and  
 any benefice  
 he is pre-  
 sented to  
 within seven  
 years after  
 to be void.

“ living, and promotion ecclesiastical, shall be estfoons merely  
 “ void; and the patron or person, to whom the advowson, gift,  
 “ presentation, or collation, shall by law appertain, may by virtue  
 “ of this act present or collate unto, give or dispose of, the same  
 “ benefice, living, or promotion ecclesiastical, in such sort to all  
 “ intents and purposes, as if the party so inducted, invested, or  
 “ installed, had been or were naturally dead; any law, ordinance,  
 “ qualification, or dispensation to the contrary notwithstanding.  
 “ The one moiety of which forfeitures shall be to her majesty, her  
 “ heirs and successors, and the other moiety to him or them that  
 “ will sue for the same by action of debt, bill, plaint, or inform-  
 “ ation, in any of her majesty’s courts of record.”

The oath  
 against simo-  
 ny.

I *A. B.* do swear, that I have made no simoniacal contract, pay-  
 ment, or promise, directly or indirectly, by myself, or by any other  
 to my knowledge or with my consent, to any person or persons  
 whatsoever, for or concerning the procuring and obtaining of this  
 ecclesiastical dignity, place, preferment, office, or living; (*here*  
*that to which the party is to be admitted, instituted, collated, installed,*  
*or confirmed, is to be particularly named;*) nor will at any time  
 hereafter perform, or satisfy, any such payment, contract, or  
 promise made by any other without my knowledge or consent;  
 so help me God through *Jesus Christ*.

Cro. Car.  
 331.  
 Bawderok v.  
 Mackallier.

A donative is not within the words of the statute, yet, as a  
 corrupt presentation thereto is within the mischief intended to be  
 remedied, it is within the meaning.

The offences prohibited by the statute are more frequently  
 committed when a church is void; but they may be committed  
 when it is full.

1 Brownl. 7.

If a contract be made when a church is full, to give a sum of  
 money after it shall become void for the presentation thereto, this  
 is an offence within the meaning of the statute.

Lane, 102.  
 Kirchen v.  
 Calvert.  
 Noy, 25.  
 Winchcomb  
 v. Pulleston.

The buying of the next presentation to a church when it is full,  
 with intent to present a certain person when it shall become void,  
 and the presenting of that person, is an offence within the mean-  
 ing of the statute.

Godb. 390.

Winch, 63.  
 Sheldon v.  
 Brett.

The purchase of the next presentation to a church, when the  
 incumbent is sick and near dying, with intent to present a certain  
 person after his death, and the presenting of that person, is an  
 offence within the meaning of the statute.

Cro. Eliz.  
 68.  
 Smith v.  
 Shelborn,  
 Pasch.  
 4 Eliz.

It has been holden, that if a father, the incumbent being sick,  
 purchase a living without the privity of his son, it is not a corrupt  
 contract, although it be with design to present the son, and the son  
 be afterwards presented, a father being bound by nature to provide  
 for his son.

But the doctrine of this case has been since contradicted, and  
 particularly in the case of *Winchcomb v. Pulleston*, Noy, 25.  
*Pasch. 15 Jac. 1.*

And the reason given in the former case, namely, that a father  
 is bound by nature to provide for his son, does not hold: for if  
 the

the purchase of a living, when, full, with intent to present a certain person, be an offence within the meaning of the statute, how can it be lawful, as the words of the statute are general, for a father to do this? A parent is by nature certainly bound to provide for his son, but this obligation can never extend to the doing of a thing prohibited by law. This way of reasoning would open a wide door for corrupt contracts; for, as every man is more bound by the law of nature to provide for himself, than a father is to provide for his son, every man might purchase a living for himself.

In a case from the court of Chancery, for the opinion of the court of Common Pleas, it was stated, that *Barrett*, having notice that the incumbent of a rectory, with cure of souls, was upon his death-bed, and that it was uncertain whether he would live out the ensuing night, purchased the advowson of the rectory; that the incumbent died the day after the purchase; and that *Barrett* presented *Reynell*. The question was, Whether the presentation of *Reynell* be void, by reason of its having been upon a simoniacal contract? The unanimous opinion of the court was, that the presentation is not void: and by *De Grey*, Ch. J. an advowson, which is a right of nominating to a benefice, being a temporal inheritance, may be conveyed like any other temporal inheritance. It is certain, that an advowson appendant may be lawfully purchased with the manor to which it is appendant, during a vacancy of the benefice; and there seems to be no reason why an advowson in gross should not. The 31 *Eliz. c. 6.* only relates to presentations, and consequently the sale of an advowson, even during a vacancy of the benefice, is not thereby prohibited, except the sale be connected with a corrupt contract for presenting. But, if an advowson be granted during a vacancy of the benefice, the presentation upon that vacancy does not pass by the grant; it being a fruit fallen, or, as is laid down in the case of *Leak v. Babington*, *Cro. Eliz.* 811. a chose in action. A *bonâ fide* purchase of an advowson is good, at what time soever it is made; and a corrupt purchase, whenever it is made, is bad. That which is said in the case of *The Bishop of Lincoln v. Woolforston*, 3 *Burr.* 1510. has been mentioned; namely, “that the court were clear, that a grant of “a next presentation, or of an advowson, made after the church “was actually fallen vacant, was a void grant.” But this, so far as it relates to the grant of an advowson, seems to be a mistake of the reporter. As the purchase of the advowson, in the present case, is not stated to have been connected with any corrupt contract for presenting *Reynell*, or with a design of presenting him, neither of these things is to be presumed, and consequently the presentation of him is not void.

Notwithstanding the determinations, that if a person purchased the next presentation to a benefice when full, with design to present a certain person, and did present that person after it became void, it was an offence within the meaning of the statute, it became a doubt, whether it was so, for a clerk to purchase for himself the

MS. Rep.  
Barrett and  
Reynell.  
Clerk, v.  
Glubbo,  
Clerk, and  
Rolle, Hil.  
16 G. 3. in  
C. B.  
[2 Bl. Rep.  
1052. S.C.]

next presentation to a benefice while it was full, and to be presented thereto after it became void.

To put an end to this doubt, it is by the 12 *Ann. c. 12.* enacted, "That if any person shall for money, reward, gift, profit, or advantage, or for or by reason of any promise, agreement, grant, bond, or other assurance, of or for any money, reward, gift, profit, or benefit, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon; that every such presentation or collation shall be utterly void and of no effect in law, and such agreement shall be deemed to be a simoniacal contract; and it shall be lawful for the queen's majesty, her heirs and successors, to present or collate unto such benefice, dignity, prebend, and living ecclesiastical, for that time or turn only; and the person so corruptly taking, procuring, or accepting such benefice, dignity, prebend, or living, shall from thenceforth be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain, or penalty prescribed or inflicted by the laws ecclesiastical, in like manner as if such agreement had been made after such benefice, dignity, prebend, or living, had become vacant."

3 *Inft.* 153. It is equally an offence within the meaning of the statute, where there has been a corrupt presentation by a person usurping the right to present, as if it had been by the person having the right.

3 *Lev.* 115. Walker v. Hamerly. 2 *Ventr.* 32. S. C. If a presentation be by one usurping the right of patronage, and pending an action of *quare impedit* for removing his clerk, who is afterwards removed, the benefice be sold, this is an offence within the meaning of the statute, for the church was never full of that clerk. If this were allowed, the statute might be eluded, for it would be only getting an usurper to present while the living was void, and then selling it.

1 *Roll. Rep.* 235. Cro. Jac. 385. A corrupt contract with the wife of the patron is an offence within the meaning of the statute, although the patron himself be not privy thereto.

Lane, 103. Kitchen v. Calvert. If a clerk contract to give money for being presented to a church, and be afterwards presented thereto *gratis*, this is an offence within the meaning of the statute; the clerk being deemed an unfit person to hold the benefice, for having at any time been capable of intending to obtain it corruptly.

Cro. Car. 331. Bawderick v. Mackallier. Sid. 329. 3 *Lev.* 337. A corrupt contract for procuring a presentation to a benefice between strangers, although neither the patron nor incumbent be privy thereto, is an offence within the meaning of the statute; for if there be a corrupt contract, it matters not by whom it is made: but in this case the presentee is a *simoniacè promotus*, and not a *simoniacus*.

Lane, 73. Calvert v. Kitchen. A second brother, having a right to present, made a corrupt contract to present a certain person; but in order to elude the statute,

statute, surrendered the right of presenting to his elder brother. The latter, not being privy to the contract, presented the person who, pursuant thereunto, was to be presented. It was holden, that the corrupt contract was an offence within the meaning of the statute, and that its being performed by an innocent person made no alteration in the case.

An agreement was between *Richards* a friend of *Boughton's* and *Taylor*, that *Boughton* should present *Hide*, and that *Taylor* should pay *Richards* 20*l.* *per annum* for six years, in case *Hide* should so long live, for the use of *Boughton*. In an action of *quare impedit*, *Hide* pleaded, that he had no notice of the agreement at or before his presentation. Upon a demurrer it was holden, that the corrupt contract is enough, and that it is immaterial whether he had or had not notice thereof.

3 Lev. 338.  
Rex v. Hide  
and others.

If a stranger, the church being void, contract with the patron for a grant of the presentation, and present a person not privy to the contract, the presentee, although the grant, it being of a chose in action, be void, is not to be considered as an usurper, but as a *simoniacè promotus*, because he was presented in pursuance of a corrupt contract.

Cro. Eliz.  
783.  
Baker v.  
Rogers.

If a father, the church being void, contract with the grantee of the next presentation to permit the grantor to present his son, and the son be presented, he is a *simoniacè promotus*.

Cro. Jac.  
533.  
Booth v.  
Potter.

If a father, in consideration of a clerk's marrying his daughter, covenant with the father of the clerk to procure for him a presentation to a certain church when it shall become void, and the clerk be presented, when the church becomes void, he is a *simoniacè promotus*.

Cro. Car.  
425.  
Birt v.  
Manning.

If an agreement be to pay five pounds *per annum* to the widow of the last incumbent, or ten pounds *per annum* to the son of the last incumbent, so long as he shall be a student at *Cambridge* and unpreferred, neither of these is an offence within the meaning of the statute.

Noy, 142.  
Baker v.  
Mountford.

A bond, with a condition that the incumbent shall not be absent eighty days in a year from his living, is not simoniacal; this being a lawful condition.

1 Roll. Rep.  
Carey v.  
Yeo.

*A.* covenanted, that *B.* his son should marry *C.* the daughter of *D.* In consideration of the marriage *D.* covenanted to advance 300*l.* for his daughter's portion, and *A.* covenanted to settle certain lands on *B.* and *C.* There were likewise covenants on the part of *A.* for the value of the lands and for quiet enjoyment, and a covenant on the part of *D.* to procure a certain benefice for *B.* on the next avoidance. It was holden, that this was not a corrupt contract, it not being a covenant in consideration of the marriage, but a distinct and independent covenant without any apparent consideration.

Cro. Jac.  
426.  
Byrie v.  
Manning.

## (B) How far a Bond for resigning a Benefice is good at Law.

A Bond for resigning a benefice is sometimes special, at other times it is general.

The condition of a special bond is, that the incumbent shall resign in favour of a certain person, when that person shall be capable of being presented to the benefice.

The condition of a general bond is, that the incumbent shall resign upon request.

Cro. Jac.  
248.

Jones v.  
Lawrence.

[So, a bond given by the incumbent to the patron to resign if he did not reside upon the living, hath been holden good.

*Bagshaw v. Bofsley*, 4 Term Rep. 78. And where a bond was conditioned to reside, to resign for the patron's son to be presented, and to keep the parsonage-house and chancel in repair, the court of King's Bench gave judgment for the plaintiff without argument, saying, as this was not precisely similar to the case of the Bishop of London v. Ffytche, they were bound by the established series of precedents. *Partridge v. Whiston*, *Id.* 359.]

Cro. Car.  
180.

Babington v.  
Wood. [Sir

Wm. Jon.  
220. S. C.

*Watson v. Baker*, Sir T. Raym. 175. S. P.]

The doctrine of this case, which was the case of a special bond, was not many years after extended to the case of a general bond, and the judgment in the latter case was also affirmed in the Exchequer-chamber.

Stra. 227.  
Peele v. the  
Countess of  
Carlisle.  
Sayer, 141.  
Wyndham  
v. Bowen.

Ambl. 268.

(a) This decision, which was brought about by the great eloquence and ability of the Chancellor Thurlow, and the honest zeal of

In two modern cases, the court refused to permit the validity of a general bond for resigning a benefice to be argued against: and, in the former of these cases, it is said by the court that a general bond for resigning a benefice has been frequently holden good in the court of Chancery.

[And in the case of *Grey v. Hesketh*, Lord Hardwicke said, these sort of bonds are held good at law, and so they are in equity, unless an ill use is attempted to be made of them, in which case that court will interfere. However, notwithstanding these decisions, general bonds of resignation were declared void at law by the House of Lords in the great case (a) of the Bishop of London v. *Difney Ffytche* (May 1783); and the judgment of the court of Common Pleas, affirmed by the King's Bench, was accordingly reversed.]

the bishops, was contrary to the opinion of all the Judges, except Eyre, B. and seems not likely to be acquiesced in. *Id.* 4 Term Rep. 78. 359.



(C) Of the Power exercised over a Bond for resigning a Benefice by Courts of Equity.

**I**F an improper use be made of a bond for resigning a benefice, relief may be had in a court of equity.

A perpetual injunction was granted, because it appeared, that a bond for resigning a benefice had been made use of, to prevent the incumbent from demanding tithes of his patron.

1 Vern. 411.  
Durston v.  
Sands.

Upon a bill to be relieved against a judgment, obtained on a general bond for resigning a benefice, it appeared, that the obligee had made an offer to the incumbent, that if he would give him seven hundred pounds, he should not be sued upon the bond. Satisfaction was ordered to be entered on the judgment, and a perpetual injunction was granted. A new bond of resignation in the penalty of two hundred pounds was decreed; but it was ordered, that no action should be brought thereupon without leave of the court. The Lord Keeper said in this case, he did not know, that such bond had ever been held good, except to preserve the benefice for the patron himself, or for a son or friend of his, or to prevent the non-residence, or to punish the vicious course of life of an incumbent, and that, although a bond be to resign generally, he would never allow it to be recovered upon, unless some such reason were shewn for requiring a resignation; because a door would be thereby opened for simony.

Eq. Ca. Abr.  
86. Hilliard  
v. Stapleton.

A bill being brought to be relieved against a judgment upon a bond for resigning a benefice, it was dismissed, upon the defendant's proving misbehaviour in the incumbent.

Eq. Ca. Abr.  
228.  
Hodgson v.  
Thornton.

In another case it is laid down, that a bond to resign a benefice upon request, shall not be made use of to turn out the incumbent, unless there be non-residence, or some gross misbehaviour; and that, if any other use be made of the bond, the court will grant an injunction.

Chan. Prec.  
513.  
Hawkins v.  
Turner.

*Capel*, upon presenting *Peele* to a living, took a bond for resigning, when the patron's nephew, for whom the living was intended, should be of age. At his coming of age it was agreed, that *Peele* should continue to hold the living on paying the nephew thirty pounds a year. After having paid this seven years, *Peele* refused to pay it any longer. An action being hereupon brought upon the bond, *Peele* filed a bill in equity, wherein he prayed an injunction, and to have all the money repaid. An injunction was granted, not on account of the invalidity of the bond; but because an ill use had been made thereof. As to the money which had been paid, *Peele* was left to his remedy at law.

Stra. 534.  
Peele v.  
Capel.

[A patron having obtained judgment against the incumbent on a general bond of resignation, the latter filed a bill in equity for a discovery, whether the advowson was not sold with a promise to procure an immediate resignation. The defendant demurred to the discovery, as tending to subject him to the penalties of the statute against simony. But Lord *Hardwicke* over-ruled the demurrer.]

Grey v.  
Heskett,  
Amb. 269.

(D) Whether the Penalty of a Bond for resigning a Benefice be saved, where the Ordinary has refused to accept a Resignation.

Watf. Com.  
Inc. 24.

IT is in one case said to be in the power of the ordinary, to discourage the use of bonds for resigning benefices, for that he may refuse to accept a resignation made in pursuance of such bond.

2 Chan. Rep.  
398.  
Durston v.  
Sands.

In another case it is said, that the bishop refused to accept a resignation, offered in pursuance of a bond for resigning a benefice, and ordered the incumbent to continue to serve the cure; declaring, that he never would countenance such unjust practices.

Chan. Prec.  
513.  
Hawkins v.  
Turner.

In another case it is laid down, that an ordinary is not obliged to accept a resignation in pursuance of a bond for resigning a benefice, unless there be some just cause for turning the incumbent out.

MS. Rep.  
Marquis of  
Rocking-  
ham v.  
Griffith.  
E. 27 G. 2.  
in Chan.  
[(a) See this  
case in  
3 Burn's  
E. L. 304-5,  
where it is  
said, that in  
the course of  
the former  
argument,  
the Chan-  
cellour held,  
that it is in  
the power of  
the ordinary  
to accept or  
refuse a resignation.]

In a late case a grant was made to a clerk of the two first of three benefices which should become void, provided he were capable when they became void of holding them. In order to make himself capable of taking one of these benefices, the clerk offered the resignation of another benefice to the ordinary, which he refused to accept. One question in this case was, Whether the ordinary was obliged to accept the resignation? It was insisted by Mr. *Henley*, upon one side, that no case can be adduced to shew, that the ordinary can arbitrarily refuse to accept a resignation of a benefice. Mr. Attorney *Murray*, who was on the other side, contented himself with saying, in answer to this, that the plainest points, having scarce ever been called in question, are supported by the fewest authorities. No decree was made as to this point; but as Lord *Hardwicke* intimated it once or twice pretty strongly to be his opinion, that the ordinary ought to have accepted the resignation, he did afterwards accept it (a).

It seems to be clear, that the bishop may refuse to accept a resignation, on a sufficient cause for his refusal; but, whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept it, are questions undecided. In the case of the Bishop of London v. *Ffytche*, the Judges in general declined to answer the question proposed to them, whether the bishop was compellable to accept a resignation? one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland, till he has resigned all his benefices in England. But Lord *Thurlow* seemed to be of opinion, that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. 3 Burn's E. L. 337, &c. Cunningham. Law of Simony.]

What fell from Lord *Hardwicke* upon this occasion, is sufficient to render the authority of the two last cases very doubtful. This was not indeed the case of a bond for resigning a benefice: but it was a stronger case; for if the ordinary cannot refuse to accept a resignation, when the design in resigning is merely to take another benefice, it would be strange to hold, that he may refuse to accept a resignation, to be made at the request of a patron, in consequence of an agreement, which it has been again and again determined, both at law and in equity, the patron had a right to make.

If a new presentation to a benefice be made, before the bishop has accepted the resignation of the incumbent, the presentation is void. Cafes in the time of Queen Ann. Cro. Jac. 193.

276. Riley v. Adams. Noy, 147.

If an obligor bind himself to resign a benefice, it is incumbent upon him to procure the ordinary's acceptance of his resignation. Lutw. 693. Studholme v. Morrifon.

In an action upon a bond, the condition appeared to be, that an incumbent should, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the patron, his heirs, executors, administrators, or assigns, resign and deliver up a vicarage into the hands of the proper ordinary; whereby it may become vacant, and the patron, his heirs, executors, administrators, or assigns may present anew. The defendant pleaded, that he did, within three months after the expiration of the six years, offer to resign, and deliver up, into the hands of the proper ordinary, the vicarage, for the ordinary to accept the same; whereby the vicarage might become vacant, and the patron might present anew; and that the ordinary did then refuse, and from thenceforth hitherto hath refused, to accept the resignation. Upon a demurrer to this plea, it was holden to be bad; because it is not therein averred, that the bishop did accept the resignation; and by *Rider, Ch. J.*, the defendant, by undertaking to resign (a), so that the vicarage may become vacant, and the plaintiff may present anew, has undertaken for the bishop's acceptance of a resignation; which, according to what is laid down in *Farne's case, Cro. Jac. 198.* is necessary to the completion of a resignation. Sayer, 185. Hesketh v. Gray, Amb. 268. S. C. [(a) Lord Hardwicke expressed himself of the same opinion, as to this point, when this case came before him in Chancery. Amb. 268.]

## (E) Some Objections to a Bond for resigning a Benefice considered.

THE result of the whole is, that a bond for resigning a benefice is good at law, and that courts of equity will restrain every improper use thereof.

One objection to a bond for resigning a benefice is, that a corrupt patron may make an ill use thereof. It is a sufficient answer to this objection, that the use of a thing ought not to be discontinued, because there is a possibility of its being abused.

Another objection to a bond for resigning a benefice, which is reported to have fallen from *Holt, Ch. J.*, in the case of *Swain v. Carter, Comb. 13.* is, that a resignation-bond comes as near simony as possible; it being easy to procure a round sum of money, by making the penalty of the bond adequate to the value of the benefice, and agreeing privately that the money shall be paid. This, which would be an oblique way of selling a benefice, would be more than would come near, for it would be downright simony. If there be no other way, or not as easy a way, to do the same thing, this objection would be insurmountable; but, if there be, the stopping of this would not prevent the mischief. The same clerk, whose conscience would allow him to do this, might as well advance

[*Vide*  
4 Term Rep.  
78.]

advance the money agreed upon at first, or, if that did not suit him, give an absolute bond to pay the money at a future time. If this be so, that the same crime may still be committed, and with as much secrecy, what good end would be answered by prohibiting such bonds, which may be made use of, to punish the neglect of duty, or the immoral conduct of an incumbent, and for other good purposes.

Another objection to a bond for resigning a benefice is, that when a patron takes a bond of resignation, the presentation is only during pleasure. Be it so; and I will suppose, which is the utmost that can be supposed, that the bond is not taken with design to make the incumbent careful in the discharge of his duty, but to let some friend or relation afterwards into the benefice. It by no means necessarily follows, that the church, which is the great thing to be guarded against, will be therefore filled with an unfit person. If the successor, which may be the case, is better qualified for the ministerial office, the interest of religion will be advanced by the exchange. If he be not so well qualified, it is an evil: but it is that evil, which, in the present circumstance of things, cannot be easily prevented.

## (F) Of the Forfeitures, Disabilities, and Punishments, incurred by Simony.

### 1. By the Incumbent.

THE person promoted in pursuance of a corrupt contract is at some times *simoniacus*; at other times *simoniacè promotus*. In the former case, wherein he is a party or a privy to the contract, he is liable to suffer more: but in the latter, although he be quite a stranger thereto, he is to a certain degree involved in the consequences of the contract. The design is, that if a sense of what becomes himself, and of the duty he owes to the publick, will not restrain a patron from being guilty of simony, a regard for the person whom he means to serve may do it.

37 Eliz.  
c. 6. par. 5.

A *simoniacus* is liable to forfeit double the value of one year's profit of the benefice he has been presented to in pursuance of a corrupt contract: a *simoniacè promotus* is not liable to this forfeiture.

3 Inst. 254.

The double value, which is in any case forfeitable under the statute, is to be the double value of what the benefice could be let for, and not the double value as valued in the king's books.

March, 84.

Neither a *simoniacus* nor a *simoniacè promotus* can sue for tithes, the right thereto being taken away by the corrupt contract.

12 Rep. 100.  
2 Roll. Rep.  
465.

It is laid down, that, although a *simoniacè promotus* be deprived, he is not disabled from being presented again to the same benefice.

Cro. Jac.  
533.  
Booth v.  
Potter.

But it has been in one case holden, that a *simoniacè promotus* can never be presented to the same benefice again.

If an incumbent take money for resigning or exchanging a benefice with cure of souls, he is liable to forfeit double the value of the money. 31 Eliz. c. 6. par. 8.

A person corruptly ordained, is liable to forfeit ten pounds, and any benefice, living, or promotion ecclesiastical, which he shall accept within seven years after his having been ordained. 31 Eliz. c. 6. par. 10.

The disabilities incurred by simony cannot be dispensed with by a *non obstante*; for when a person is, for the good of the church or state, disabled by a statute, the king's subjects have an interest in the disability, and the king can no more dispense therewith, than he can with a disability at the common law. 31 Inst. 154. 2 Hawk. c. 37. § 56.

The offence of simony is not pardoned by a general pardon. Sid. 170.

Besides the forfeitures and disabilities already mentioned, a *simoniacus*, provided he has taken the oath against simony, is liable to be indicted and punished for perjury.

Dr. *Watson* indeed makes a question, whether, since the 13. Ch. 2. c. 12. the oath against simony ought to be administered? It is by this statute enacted, "That it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or other person having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer to any person whatsoever the oath usually called the oath *ex officio*, or any other oath whereby such person may be charged or compelled to confess or accuse, or to purge him or herself, of any criminal matter, whereby he or she may be liable to any punishment or censure; any thing in this statute or any law, custom, or usage heretofore to the contrary hereof in anywise notwithstanding." The generality of the words, *any other oath*, being tied up by the subsequent words to an oath in certain cases, the thing to be considered is, whether the oath against simony is an oath, by which the person taking it is charged or compelled to confess or accuse, or to purge himself, of any criminal matter? No person does by this oath confess himself guilty or accuse himself of any criminal matter. So far from doing this, the taking of the oath is a denial in the most express terms, of his having been guilty of a particular offence. Nor does any person by this oath purge himself of any criminal matter; for at the time of taking it he does not stand charged with any criminal matter. Upon the whole, the oath against simony does not seem to be within the words or purview of that statute. Comp. Incumb. 123.

## 2. By the Patron.

If a patron be guilty of presenting corruptly, the presentation shall be void, and the king may present for that turn; and the patron is moreover liable to forfeit the right of presenting upon the next avoidance, and likewise the double value of one year's profit of the benefice. 31 Eliz. c. 6. par. 5.

But, if *A.* have the right of presentation, and *B.* the right of nomination to a benefice, and only one of them be guilty of presenting Lane, 74. Calvert v. Kitchen.

senting corruptly, the right of the other shall not be thereby prejudiced, nor shall he be subject to any forfeiture.

3 Inst. 153. If the usurper of a benefice be guilty of presenting corruptly, this shall not give the king a right to present for that turn; because it would be unreasonable to take away the right of a patron, who has not been guilty of any offence.

31 Eliz. c. 6. par. 8. The patron, who has given money, to procure the resigning or exchanging of a benefice, is liable to forfeit double the value of the money.

### 3. By the Ordinary.

31 Eliz. c. 6. par. 6. If an ordinary corruptly institute, instal, or place any person in a benefice, with or without cure of souls, he is liable to forfeit the double value of a year's profit of the benefice.

31 Eliz. c. 6. par. 10. If an ordinary take a reward for the conferring of orders, or granting a licence to preach, he is liable to forfeit forty pounds.

31 Eliz. c. 6. par. 9. Besides being liable to the forfeitures, disabilities, and punishments already mentioned, there is a proviso in the statute, that every person who shall be guilty of any offence against it, shall be subject to all the punishments, pains, and penalties, to which he was before subject by the ecclesiastical laws.

(G) In what Cases, and at what Times, Advantage may be taken of the Forfeitures and Disabilities incurred by Simony.

### 1. By the King.

31 Eliz. c. 6. par. 5. If a patron have been guilty of presenting corruptly to a benefice, the presentation is void, and the right of presenting is for that turn in the king.

3 Inst. 153. The corrupt presentation of an usurper does not however give the king a right of presenting for that turn; because it would be unreasonable to take away the right of the patron, who has not been guilty of any offence.

If there have been a presentation, in pursuance of a corrupt contract, the presentation is void, and the king may present for that turn.

Cro. Jac. 385. King v. Bishop of Norwich and others. But, if the presentee have been instituted and inducted, the king cannot take advantage of his having been corruptly presented, until he be removed by *quare impedit*; for although he be in *de facto* only and not *de jure*, the church is full, until he be removed in a judicial way, or resign.

Noy, 25. Winchcomb v. Puleston. A clerk who had been presented corruptly, continued incumbent till his death, above thirty years after; yet it was holden that the king might present, for that as the church had never been full *de jure*, the king's right of presenting was not taken away.

Lutw. 1090. Rex v. Bishop of After a benefice became vacant, *A.* agreed to give *B.* a sum of money for procuring *C.* the patron to present *D.* The money was paid,

paid, and *D.* being presented, enjoyed the living till his death. Afterwards *E.*, to whom the right of presenting for the next turn belonged, presented *F.* In *quare impedit* there was judgment for the king, although neither *E.* nor *F.* were privy to the corrupt contract between *A.* and *B.*

By 1 *W. & M. c. 16. § 2.* it is enacted, "That after the death of the person simoniack or simoniackally promoted, the offence or contract of simony shall neither in pleading, nor in evidence, be alleged, to the prejudice of any other patron innocent of simony, or of his clerk by him presented, upon pretence of lapse to the crown; unless the person simoniack or simoniackally promoted, or his patron, was convicted of such offence at the common law, or in some ecclesiastical court, in the lifetime of the person simoniack or simoniackally promoted."

By the same statute, § 3. it is enacted, "That no lease, really and *bonâ fide* made by any person simoniack or simoniackally promoted, for good and valuable consideration, to any person not being privy unto, or having notice of such simony, shall be impeached or avoided by reason of such simony, but shall be good and effectual in law."

One moiety of the forfeitures for offences against the 31 *Eliz. c. 6.* is by § 10. of that statute given to the queen, her heirs and successors.

## 2. By other Persons.

If any person have been corruptly instituted, the benefice becomes void; and the person, in whom the right of presenting is, may present thereunto, in such sort as if the person so instituted had been dead. 31 *Eliz. c. 6. par. 6.*

No title to present by lapse can accrue upon any avoidance mentioned in the 31 *Eliz. c. 6.* until six months are expired after notice has been given of such avoidance by the ordinary to the patron. 31 *Eliz. c. 6. par. 7.*

This provision of the statute is agreeable to the canon law, by which lapse cannot run against the patron, until notice has been given him by the ordinary that the church is void. Dyer, 293.

If two claim the right of presentation to a vacant benefice, and the ordinary be not named in a *quare impedit* brought to determine the right, it shall, if a judgment be not obtained within six months after notice given that the benefice is void, lapse to the ordinary. 2 *Roll. Abr.* 365. *Abbot of York v. Bishop of Norwich.*

By a judgment in *quare impedit* the incumbent is so removed, that the patron who recovers may present, although there be no sentence of deprivation: but the clerk, against whom the judgment is obtained, continues incumbent *de facto* until such presentation be made. 1 *Roll. Rep.* 62.

One moiety of the forfeitures, for having been guilty of offences against the 31 *Eliz. c. 6.* is by § 10 of that statute given to the person who will sue for the same.

## (H) Of the Jurisdiction of Spiritual Courts in Simony.

(a) Cod.  
239, 849.

SOME have been of opinion, and amongst these is the learned (a) author of the Codex, that only spiritual courts had before the statute a power to punish simony: but if, as it has been already observed, simony is an offence at the common law, there can be little doubt of its having been always punishable in temporal courts. It may be true in fact, that it was for the most part, or perhaps altogether, proceeded against in the spiritual courts. As the interest of religion is by this offence struck at in a more remarkable manner, this is not to be wondered at; and the less, if it be considered, that in times antecedent to the statute, spiritual courts did, in some cases, wherein there was a concurrent jurisdiction, encroach upon, and in others entirely swallow up, the jurisdiction of the temporal. Although then it cannot at this time be made appear, that temporal courts did heretofore exercise any jurisdiction in simony, it does by no means necessarily follow, that they had none.

31 Eliz.  
c. 6. § 9.

By the statute a power is reserved to spiritual courts of inflicting such punishments, pains, and penalties, in all the cases therein mentioned, as by the laws ecclesiastical could before the making thereof be inflicted.

Cro. Eliz.  
788.  
Baker v.  
Rogers.

It has been holden, that the sentence of a spiritual court in simony, it being a matter properly triable there, is to be taken to be true, although in its consequence it divest the incumbent of his freehold.

Comb. 73.  
Boyle v.  
Boyle.

If a man have been acquitted upon a charge of simony in a temporal court, a spiritual court may re-examine the matter.

Cro. Eliz.  
612.  
Rifky v.  
Wentworth.

Upon a motion for a prohibition to a suit in a spiritual court for tithes, upon the ground, that the incumbent, being a simoniack, had no right thereto; it was holden, that a prohibition does not lie; and by the court: simony may be more aptly tried in the spiritual court.

(I) Of the Pleadings in an Action upon the  
31 Eliz. c. 5.

THE possession of a benefice, to which an incumbent has been simoniacally promoted, may be recovered by an assise of *darrein presentment* or by an action of *quare impedit*. The latter is usually preferred; because, besides being a shorter way of proceeding, the right of presentation as well as the right of advowson is thereby recoverable.

Vaugh. 57.  
King v.  
Bishop of  
Worcester  
and others.

It is not enough, to allege in the declaration in an action of *quare impedit*, that the plaintiff, or the person under whom he claims, is seised of the advowson; but a presentation must be alleged by him or some person under whom he claims; for unless  
a past



a past presentation has been joined to the title, it does not appear that the right of presentation is now in the plaintiff.

The declaration, in an action of *quare impedit* upon the statute, is good, although there be no recital of the statute: but it was formerly the practice, and it is as well, to recite it. Lutw. 1090.

Nor is there any danger in reciting the statute; a misrecital not being fatal. Cro. Eliz. 788. Baker v. Rogers.

[*Sed quare*, for where a person not bound to recite a statute will yet hazard a recital, if he errs, according to modern resolutions, it is fatal. And note, in the principal case, no objection was taken to the misrecital.]

It is not enough, to aver in the declaration in an action of *quare impedit* upon the statute, that the incumbent is a simoniack: but as the word *simony* is not in the statute, some simoniacal act, which brings him within it, must be shewn. Comb. 102. Betts v. Lowe.

At the common law the patron must be named in a writ of *quare impedit*, for as the incumbent could not allege any thing which concerned the right of patronage, it would be unreasonable to name only a person who could not defend the right of patronage: but, as the incumbent is, by the 25 *Edw. 3. c. 7.* enabled to plead his patron's right of patronage in defence of his incumbency, it is not now necessary to name the patron, unless his right of inheritance will be affected by the judgment. 7 Rep. 26. Hall's case. 3 Lev. 16.

An incumbent cannot plead his patron's right of patronage, without shewing that he is parson imparsoner of the presentation of his patron. 7 Rep. 26. Hall's case.

An incumbent is not parson imparsoner as against the king, unless he have been admitted, instituted, and inducted; but admission and institution will make him so as against any other person. Ibid.

At the common law the ordinary could only plead, that he does only claim as ordinary; but since the statute of 25 *Ed. 3. c. 7.* he may plead a title in himself by lapse, or that the right of patronage is in him.

If *ne disturba pas*, which is in effect the general issue, be pleaded in an action of *quare impedit*, it amounts to a confession of the right of patronage, and only defends the wrong with which the defendant is charged; and consequently the plaintiff may pray immediately a writ to the ordinary, or he may proceed in the action in order to recover damages for the disturbance. Hob. 162. Rolt and another v. the Bishop of Litchfield.

## Slander.

**S**LANDER is the publishing of words, in writing or by speaking; by reason of which the person, to whom they relate, becomes liable to suffer some corporal punishment, or to sustain some damage.

It is no excuse *in foro conscientie*, that the slanderous words which have been spoken or written are true; although the law, in compassion

[(a) It is not in compassion to men's infirmities, that the law allows the truth of words to be a justification in an action, but, because, if the words spoken are true, the individual of whom they are spoken can complain of no injury. In one case Lord Camden is reported to have said, that if words are true they are no slander, but may be justified. 2 Wils. 301. But surely this is taking the word slander, only in its ordinary acceptance, as signifying merely the circulation of mischievous falsehoods. For malicious slander, and the slander must be malicious to found a legal proceeding, is the relating of either truth or falsehood, for the purpose of creating mischief; for truth may be made instrumental to the success of malicious designs as well as falsehood. See Paley's Phil.]

[(b) Hence a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words *rogue* and *rascal* of any one, an action will not lie; but, if those words are written and published of any one, an action will lie: if one man should say of another, *he has the itch*, without more, an action would not lie: but, if he should write those words of another, and publish them maliciously, no doubt but the action well lies. Per Gould, J. 2 Wils. 204.]

For written slander the party injured may proceed against the author by indictment or information, it being considered as a public offence; he may likewise proceed by an action upon the case for the damage sustained, and he may in some cases institute a suit in a spiritual court.

Peers and the great men of the realm, besides these methods of redress, have another by an action of *scandalum magnatum*, which is peculiar to themselves.

If the slander be by words spoken, there is in the general no other remedy than by an action upon the case or a suit in a spiritual court; yet, in certain cases, the speaker of slanderous words may be proceeded against as a criminal. For instance, if the words be a slander upon the state, as saying the coin is abused by authority, or saying any thing whereby the state may be prejudiced; or, if they be a slander which it more particularly concerns the public to prevent, as speaking any thing slanderous to a justice of peace in the execution of his office, the slanderer may be proceeded against by indictment or information.

The criminal methods of proceeding against a slanderer having been treated of under the titles *Indictment* and *Information*, and the method of proceeding by action of *scandalum magnatum* under its

its proper title, it only remains to consider that sort of slander, for which the remedy is by an action upon the case or by a suit in a spiritual court.

For the better understanding whereof it will be proper to consider,

(A) In what Cases an Action for Words in the general lies.

(B) What Words are in themselves actionable.

1. Words which import the Charge of a Crime.

1. *Of Treason.*
2. *Of Murder.*
3. *Of Perjury.*
4. *Of Forgery.*
5. *Of Theft.*
6. *Of another Crime.*

2. Words which import the Charge of having a contagious Distemper.

3. Words which are disgraceful to a Person in an Office.

1. *To a Person in a judicial Office.*
2. *To a Person in an Office of Trust.*

4. Words which are disgraceful to a Person of a Profession or Trade.

1. *To a Clergyman.*
2. *To a Physician or a Surgeon.*
3. *To a Barrister or an Attorney at Law.*
4. *To a Person professing an Art.*
5. *To a Tradesman.*

(C) Some Words which become actionable by reason of the Damage received from them.

(D) Certain Circumstances which are to be regarded in the Construction of Words.

1. The Time when the Words were published.
2. The Place where the Words were published.
3. The Language the Words were published in.
4. The Occasion of publishing the Words.
5. The Intention in publishing the Words.

(E) In what Cases slanderous Words published in a Course of Justice are actionable.

(F) In

- (F) In what Cases Words in the past or future Tense are actionable.
- (G) How far Words must be affirmative, in order to render them actionable.
- (H) How far Words must be certain, in order to render them actionable.
- (I) By what Means the Want of Certainty, sufficient to render Words actionable, may be supplied.

- 1. By the Intention of the Speaker.
- 2. By an Averment.

- (K) In what Cases doubtful Words are to be construed *in mitiori sensu*.
- (L) In what Cases doubtful Words are not to be construed *in mitiori sensu*.
- (M) In what Cases adjective Words are actionable.
- (N) In what Cases Words which import only an Intent are actionable.
- (O) In what Cases disjunctive or copulative Words are actionable.
- (P) In what Cases an Action does not lie, by reason of Repugnancy in the Words.
- (Q) In what Cases an Action lies for repeating Words which were published by another Person.
- (R) In what Cases actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by subsequent Words.
- (S) Of the Pleadings in an Action for Words.

- 1. In the General.
- 2. In what Cases an Averment is necessary.
- 3. In what Cases a Colloquium is necessary.
- 4. What is the Use of an Inuendo.
- 5. What may be pleaded in Justification of Words.

- (T) In what Kinds of slanderous Words Spiritual Courts have Jurisdiction.

(U) In

## (U) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Words.

1. Where actionable Words are coupled with Words which are a spiritual Defamation.
2. Where a temporal Damage has been received from Words which are a spiritual Defamation.
3. Where the Words, which are a spiritual Defamation, import a Charge of an Offence not conusable in a Spiritual Court.

## (A) In what Cases an Action for Words in the general lies.

**A**N action upon the case lies for the publishing of any words, by reason of which the person to whom they relate receives any damage; but it is not always necessary to shew the damage received. The distinction is, that where the natural consequence of the words is a damage; as, if they import a charge of having been guilty of a crime, or of having a contagious distemper; or, if they are prejudicial to a person in an office, or to a person of a profession or trade, they are in themselves actionable: In other cases, the party, who brings an action for words, must shew the damage which was received from them.

[There are two general rules for determining whether words are actionable. The first is, that the words must contain an express imputation of some crime

liable to punishment, some capital offence or other infamous crime or misdemeanour; and the charge upon the person spoken of must be precise. The other is, if the words may be of probable ill consequence to a person in a trade, a profession, or an office.—These are the two general rules which have usually governed cases for scandalous words. There must be some certain or probable temporal loss or damage to make the words actionable. No imputation of the breach of legal or moral obligation, unless enforced by temporal sanctions; no charge of the want of chastity, unless under special circumstances, 1 Lev. 134. will be sufficient to found an action. 3 Wils. 186. 2 Bl. Rep. 752. 6 Term Rep. 694.]

It makes no difference whether the slander be published in writing or print, or by speaking; for although the party injured may, where it is in writing or print, this being a publick offence, proceed in a criminal way against the author, he is not thereby precluded from obtaining satisfaction by an action for the injury to himself.

4 Rep. 14.  
Buckley v.  
Wood.  
3 Leon. 138.  
Cro. Eliz.  
247.

The writing of slanderous words in a private letter to a third person is a publication of the words.

2 Vent. 28.  
King v.  
Lake.

If the words be only a spiritual defamation an action does not lie; the remedy being by a suit in a spiritual court.

1 Roll. Abr.  
34.  
Matthew v.  
Crofe. 4 Co. 20. Cro. Jac. 323.

But, if a temporal damage have been received from words, which are a spiritual defamation, or, if such words are coupled with others which are actionable, a prohibition lies, to a suit in a spiritual court for the words. It would be vexatious, if the publisher of such words could be proceeded against both in a temporal and spiritual court; and, as only a temporal court can make the injured

2 Rep. 17.  
20, 21.  
Carth. 213.  
Salk. 552.  
Comb. 138.  
392.  
Sid. 214.

injured party satisfaction for the damage sustained, the proceeding in a spiritual court being *pro salute animæ* only, it is not reasonable that he should proceed in both courts.

## (B) What Words are in themselves actionable.

### 1. Words which import the Charge of a Crime.

**A**S no greater injury can be done to a person, than to accuse him of a crime, for which he may be brought into danger of suffering corporal punishment, words which import such accusation have always, and with the highest reason, stood first in the list of those which are in themselves actionable.

#### 1. Of Treason.

**Cro. Eliz.** An action lies for publishing these words of *J. S.*, *He is a rebel,*  
638. *and not the queen's friend.*  
**Redstone v.**  
**Elliot.** 1 Roll. Abr. 49.

**Cro. Eliz.** So, for publishing these words, *He is an enemy to the state;* for  
602. *they are a very great slander, if not a charge of treason.*  
**Charter**  
**v. Peter.**

1 Roll. Abr. So, for publishing these words, *He did treason in the Low Countries;*  
63. pl. 32. *because a person may be tried and punished in England for treason*  
35 H. 8. *in the Low Countries.*  
c. 2.

**Salk.** 696. It is said, that an action lies for publishing these words of *J. S.*,  
**How v.** *He is a Jacobite, and is for bringing in the Prince of Wales and*  
**Prinn.** *popery, to the destroying of our nation;* because they import a charge of evil principles.

**Ld. Raym.** In another report of the same case, these words are said to be  
812. *actionable, if published of a person in an office; but it is not said*  
*that they are so, when published of a private person.*

8 Mod. 283. The doctrine of the report of this case in *Salkeld* is recognized  
**Fry v.** in a subsequent case, in which it is laid down, that an action lies  
**Corne.** for publishing the following words of any person, *He has the Pre-*  
*tender's picture in his room, and I saw him drink his health. And he*  
*said he had a right to the crown.*

#### 2. Of Murder.

1 Roll. Abr. An action lies for saying to *J. N.*, *Thou hast killed a man;*  
77. *for, although no particular man be named, this is a great slander.*  
**Cooper**  
**v. Smith.**

**Cro. Jac.** So, for saying, *You have killed the servant of J. S.*, or, *You have*  
423. *stolen the horse of J. S.*, although it be not shewn that *J. S.* had a  
**Cooper** servant or a horse; for, until the contrary be shewn, this shall be  
**v. Smith.** intended.  
1 Roll. Abr.  
77.

1 Vent. 117. It was heretofore holden, that an action did not lie for publish-  
**Phillips v.** ing words, which import a charge of murder, without an aver-  
**Kingston.** ment, that the person said to be murdered is dead; but the latter  
**Cro. Jac.** and  
489.

and better opinion is, that the person shall be intended to be dead, unless it appear in the pleadings that he is alive.

Sid. 53.  
Cro. Eliz.  
569. 823.

### 3. Of Perjury.

No action lies for publishing these words of *J. S.*, *He is fore-sworn*, unless it be added, in a judicial proceeding: but it does for publishing these words, *He is perjured*; for these words shall be intended to mean, that he is forsworn in a judicial proceeding.

4 Rep. 15.  
Stanhope v. Blith.  
2 Bullstr.  
150.  
3 Inst. 166.  
[Holt v. Scholefield, 6 Term Rep. 691.]

Ecclesiastical courts are not mentioned in the statute of the 5th of *Eliz.* against perjury; yet it has been holden, that an action lies for publishing these words of *J. S.*, *He is forsworn in an ecclesiastical court*.

Cro. Eliz.  
609.  
Shaw v. Thompson.  
[2.]

An action lies for publishing these words of *J. S.*, *He was forsworn before a justice of peace*; for this offence, if not within the words, is certainly within the purview of the statute.

3 Lev. 166.  
Gruneth v. Derry.

An action will lie for publishing words which import a charge of perjury, although it be not a perjury within the statute; for perjury is an offence punishable at the common law.

1 Roll. Abr.  
39. Pruerv.  
Moadman.  
3 Inst. 164.

No action lies for publishing these words of *J. S.*, *He has forsworn himself in Leake Court*, without shewing that this is a court which could compel the taking of an oath.

1 Roll. Abr.  
39. Lawe v. Bennett.  
3 Inst. 166.

Nor does an action lie for saying to *J. S.*, *Thou wast forsworn before the Bishop of Norwich*; because it does not appear to have been before him in his court, and it shall not be intended that it was.

1 Roll. Abr.  
69. Keble v. Page.

An action does not lie for publishing these words of *J. S.*, *He hath delivered false evidence and untruths in his answer to a bill in Chancery*; for, as some things in a bill in Chancery are not material to what is in dispute between the parties, it is no perjury, although such things are not truly answered.

1 Roll. Abr.  
70.  
Mitchell v. Brown.  
3 Inst. 167.

No action lies for publishing these words of *J. S.*, *He is detected of perjury*; for a man who is not guilty of a crime may be detected; and it may be said of every man, against whom a bill of indictment is preferred for a crime, that he is detected of that crime.

4 Rep. 16.  
Weaver v. Cariden.  
Cro. Car.  
263.

It is in one case said, that an action does not lie for publishing words which import a charge of subornation of perjury, unless it be averred, that the perjury was committed; for that the hiring of a man to commit a perjury is no offence, unless the perjury have been committed.

1 Roll. Abr.  
51. Harris v. Dixon.  
Pasch. 3 Jac.

But, in another report of the same case, (for it appears to be the same although reported as of a different year,) it is said to have been holden, that such words, which are a great imputation, are actionable, although it be not alleged, that the perjury was committed.

Cro. Jac.  
158. Harris v. Dixon.  
Pasch. 5 Jac.

The doctrine of the last-mentioned report was confirmed in a case some years after; it being there holden, that an action lies for publishing these words of *A.*, *He gave 10 l. to B. for forswearing*

1 Roll. Abr.  
41.  
Ewer's case.  
M. 9 Car.

ing himself in Chancery; and it is in this case said, that it shall be intended there was a subornation of perjury.

#### 4. Of Forgery.

An action lies for publishing any words which import the charge of such forgery, as is within the meaning of any statute against this offence.

1 Roll. Abr. 66. Pudfey v. Pudfey. 1 Roll. Abr. 65. Garbut v. Bell. So, for charging a man with forgery, although it be not such forgery as is within the meaning of any statute against this offence; forgery being punishable at the common law.

3 Leon. 231. 1 Roll. Abr. 65. pl. 4. [But this case was over-ruled by the court of Common Pleas in the case of Jones v. Herne, 2 Will. 87. and these words, *You are a rogue, and I will prove you a rogue, for you forged my name*, were holden to be actionable.] But no action lies for publishing these words of J. S., *He hath forged the hand of J. N.*; for, unless it had been said to what deed, instrument, or writing the hand was forged, these words are too general to import the charge of such forgery as is punishable under any statute, or at the common law.

#### 5. Of Theft.

Cro. Jac. 114. Minors v. Leeford. An action lies as well for calling a man thief, as for charging him with having been guilty of a particular larceny.

Stra. 142. Morgan v. Williams. After a verdict for the plaintiff, in an action for publishing these words of him, *He is a thief of every thing*, it was said, in order to arrest the judgment, that a person cannot be a thief of every thing, the stealing of trees growing not being a larceny. Judgment was given for the plaintiff; and by the court: it must be intended, that these words import a charge of stealing every thing of which the plaintiff could be a thief; because, as these words include every thing which can be stolen, they must intend a stealing of that which it is felony to steal.

3 Inst. 109. As the taking and carrying away of a thing annexed to the realty is not a larceny, an action does not in the general lie for publishing words, which charge the stealing of such thing.

Sid. 104. Hall v. Hammond. Agreeably hereto it has been determined, that it is not actionable to publish these words of J. S., *He stole the shutters of my windows*; but if the words had been, *He stole the shutters off my windows*, an action would have lain.

Cro. Jac. 59. Kellam v. Manesby. Hob. 331. Cro. Jac. 114. 674. 3 Inst. 109. According to some old cases no action did lie for publishing words, which import the charge of stealing trees growing, or of lead fixed to a house; because these offences are only trespasses.

And although it be at this day actionable, to charge a man with having been guilty of cutting down trees, or of stealing lead fixed to a house, this, which is occasioned by statutes made for punishing those offences, since those cases were determined, by no means impeacheth



peacheth their authority; the principle on which they are founded being still law.

It has been holden, that no action lies for publishing these words, *I charge J. S. with felony, for taking money out of my pocket*; because the words do not necessarily imply a felonious taking. Hutt. 38. Mason v. Thompson.

And in another case it has been holden, that no action lies for publishing these words of *J. S., He is a pickpocket; he picked my pocket of my money*; for, as it does not appear that the taking was felonious, this might be only a trespass. 2 Lev. 51. Walls v. Rymes. 1 Ventr. 213.

But in another case it is laid down, that an action does lie for publishing these words, *I charge J. S. with felony in taking my money out of my pocket*; because it shall be intended, that the taking was felonious, and the case of *Mason v. Thompson*, upon the authority of which the case of *Walls v. Rymes*, was probably determined, is in this case denied to be law. Id. Raym. 959. Balcer v. Peirce.

An action lies for any words, which amount to the charge of petty larceny; for, besides that the party guilty of this offence incurs a forfeiture of all his goods, he is liable to suffer the punishment of whipping, or to be transported. 1 Roll. Abr. 13. Carter v. Hunt. 3 Inst. 109.

#### 6. Of another Crime.

It is actionable to publish these words of *J. S., He did burn a barn with corn in it, or a barn that was parcel of a mansion-house*; the burning of such barn being a felony. 4 Rep. 20. Barham's case.

An action lies for publishing these words of *J. N., He harboured his son, knowing him to be a Romish priest*; the doing of this being a felony. Cro. Jac. 300. Smith v. Flint.

No action lies for publishing these words of a person, except he be in an office, *He is a papist*; but it does for publishing these words, *He goes to mass*; for this renders him liable to suffer corporal punishment. 2 Ventr. 265. Walden v. Mitchell.

Heretofore no action lay for publishing these words, *He received stolen goods, knowing them to be stolen*; because a receiver of such goods was not an accessory, unless he had aided or comforted the thief. 1 Roll. Abr. 68. Dawes v. Boughton. Cro. Eliz. 880.

But there can be no doubt of such words being at this day actionable; for receivers of stolen goods, knowing them to be stolen, are by one statute declared to be accessories after the fact, and by another are liable to be transported for fourteen years. W. & M. c. 9. 4 G. 1. c. 11.

The books abound with cases of actions for words, which charge the having been guilty of such acts of conjuration, witchcraft and dealing with evil or wicked spirits, as were within the meaning of the 1 Jac. c. 11.

These offences being put an end to by the repeal of that statute, such actions would consequently have been at an end; but, to remove all doubt, it is expressly provided by the repealing statute, that no suit shall be commenced against a person, for charging another with any of these offences. 9 G. 2. c. 5.

4 Rep. 17. It is laid down, that an action lies for publishing these words of  
 Ann Davie's a woman, *She has had a bastard.*  
 case.

Salk. 694. But this case has been denied to be law; and it has been holden,  
 696. that no action lies for publishing these words, except it be averred,  
 1 Roll. Abr. that the bastard has been chargeable to a parish; for, unless it  
 38. have been so, the mother of a bastard is not liable to imprisonment, under the 18 Eliz. c. 3.

Cro. Car. No action lies for publishing these words of J. S., *He is the*  
 436. Salter *reputed father of a bastard*, except it be averred, that the bastard  
 v. Brown. has been chargeable to a parish: for, unless it have been so, the  
 1 Roll. Abr. reputed father of a bastard is not liable to punishment under the  
 37. 18 Eliz. c. 3.

1 Roll. 4br. An action does not in the general lie for calling a woman *whore*,  
 36. Haffell this being only a spiritual defamation: but it lies in *London*,  
 v. Cooper. whores being by the custom of that city liable to be carted (a).  
 Comb. 138. [(a) It seems that this custom has never been proved, so as to maintain an action in Westminster-hall:  
 in the City-court, the action is maintained, because they take notice of their own customs without proof.  
 Dougl. 380. 4 Burr. 2032.]

Lutw. 1042. It has been holden, that no word tantamount to the word *whore*,  
 Houbton v. is within the custom of the city of *London*; and consequently,  
 Miller. that no action lies except the word *whore* be made use of.

Str. 555. But this case is not now law; it having been since holden, that  
 Cock v. an action lies in *London* for calling a woman *strumpet*.  
 Wingfield.

Stra. 471. It hath been holden likewise, that in *London* it is actionable to  
 62. Vicans v. call a woman's husband *cuckold*; for that, as this is tantamount  
 Worth. to the calling of her *whore*, it is within the custom of that  
 Ib. 545. city.

Cro. Car. It is not actionable to call a woman a *bawd*; this being only a  
 229. Hol- spiritual defamation.  
 linghead's  
 case. Ib. 261.

1 Roll. Abr. But it is actionable to charge any person with keeping a bawdy-  
 44. Turnam house; because keeping a bawdy-house is an offence punishable at  
 v. Thorn. the common law.  
 Cro. Car.  
 229. 261.

1 Roll. Abr. An action lies for publishing these words of a brewer, *His beer*  
 62. Lee v. *is unwholesome*; for a brewer that sells unwholesome beer is pu-  
 Stradwick. nishable; and it shall be intended to mean the beer which he  
 sells.

Owen, 150. It is actionable to charge a person with having been guilty of a  
 Cuddington crime, of which he has upon a trial been acquitted.  
 v. Wilkins.

Heb. 81. An action lies for charging a man with having been guilty of a  
 Cuddington crime, of which he has been convicted and afterwards pardoned;  
 v. Wilkins. for the pardon takes away the guilt as well as the punishment.

2 Show. 32. It has been holden, that no action lies for publishing these  
 Scole v. words of J. S., *He is a regrator*; because the offence of regrating  
 Lee. does not render a person liable to the loss of life or limb.

It has likewise been holden, that an action does not lie for publishing these words of *J. S.*, *He has stolen my Lord Shaftesbury's deer*; [for though imprisonment be the punishment for this offence, yet *per Holt*, C. J. it is not a scandalous punishment. A man may be fined and imprisoned in trespass. There must not only be imprisonment, but an infamous punishment].

*Holt* in this case carries it too far, as to precision; for it is laid down in *Finch's Law*, 185, if a man maliciously utters any false slander to the endangering one in law, as to say, *He hath reported that money is fallen*; for *he shall be punished for such a report, if it be false*. Here is the case of a crime, and the punishment not infamous; and yet *Finch* seems to say an action lies for these words. 3 Will. 186.]

Salk. 696.  
Turner v.  
Ogden. Hil.  
3 Ann.  
[I think,  
says my  
Lord C. J.  
De Grey,

The first of these cases is not law, or at least not in the latitude there laid down; for by the 5 *Ed. 6. c. 14.* a regrotor is liable to be set in the pillory for the third offence; and it is contrary to the tenor of many cases, of equally good authority with this, to say, that only words importing the charge of a crime, which may be punished with the loss of life or limb, are actionable.

And the latter case does not seem to be law; for by a statute many years antecedent thereto, it is ordained, that a person guilty of stealing deer shall, in default of paying the penalty of 30*l.*, be set in the pillory. 3 W. & M. c. 10.

But taking the punishment for stealing deer to have been, at the time this case was determined, only imprisonment, the case does not appear to be law; inasmuch as it does not coincide with the principle on which actions for words in themselves actionable are founded; which is, that words, which imply a damage, are in themselves actionable; and, surely, to charge a person with having been guilty of an offence, for which he may be imprisoned, does imply a damage, for which he ought to have satisfaction.

The doctrine of this case is moreover contrary to what is laid down in the three following cases, and in many others which might be mentioned.

In one of these it is laid down, that an action lies for any words which import the charge of a crime, for which the person charged may be indicted. Freem. 46.  
Mayne v. Diggle.

In another it is laid down, that an action lies, for charging a woman with being the mother of a bastard, in case the bastard has been chargeable to a parish; because she is liable to suffer imprisonment, under the 18 *Eliz. c. 3.* Salk. 694.  
696.  
1 Rol. Abr. 33.

In the other it is laid down, that an action lies for any words, by reason of which the person of whom they are published may be imprisoned. 2 Vent. 266.  
Walden v. Mitchell.

No action lies for publishing these words of *J. S.*, *He is a rogue, a villain, or a varlet*; for these, and words of the like kind, are to be considered as words of heat. 4 Rep. 15.  
Stanhope v. Birch. Sir. 304.

But an action lies for publishing these words of *J. S.*, *He is a rogue of record*; for a person cannot be a rogue of record, unless he stand convicted upon record. 1 Rol. Abr. 43.  
Allesly v. Mawditt.

No action lies for publishing these words of *J. S.*, *He is a cozening knave*. Cro. Jac. 427.  
Brunkard v. Segar.

1 Rol. Abr. So, none lies for publishing these words, *He is a scurvy fellow.*  
43. Fisher v. Atkinson.

## 2. Words which import the Charge of having a contagious Distemper.

Man being formed for society, and standing in almost constant need of the advice, comfort, and assistance of his fellow-creatures, it is highly reasonable, that any words, which import the charge of having a contagious distemper, should be in themselves actionable; because all prudent persons will avoid the company of a person having such distemper.

It makes no difference, whether the distemper be owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted; for in every one of the cases, the being avoided, from whence the damage arises, is the consequence.

Cro. Jac. An action lies for publishing these words of J. S., *He is a*  
244. *leper.*  
Taylor v.  
Perkins. 1 Rol. Abr. 44.

1 Rol. Abr. So, for publishing these words, *He has the great pox.*  
43. Milner v. Reeve.

12 Mod. 248. So, for calling a woman *Pockey whore.*  
Whitfield v. Powell.

Carlake v. [But charging another with *having had* a contagious disorder  
Mapledor- is not actionable; for unless the words impute a continuance of  
ram, 2 Term the disorder at the time of speaking them, the gist of the action  
Rep. 473. fails; for such a charge cannot produce the effect which makes it  
Taylor v. the subject of an action, namely, exclusion from society. To make  
Hall, 2 Str. such words actionable, some special damage must be alleged in  
1189. consequence of them.]

## 3. Words which are disgraceful to a Person in an Office.

As any words published of a person, who is in the enjoyment of an office of honour, profit, or trust, which import a charge of unfitness to discharge the duty of the office, must be prejudicial to that person; such words are in themselves actionable.

Salk. 695. If a person be in an office of profit, words which import a  
How v. charge of inability, are as well actionable as those which imply a  
Prynn. want of integrity. But if the office be an office of honour, no  
16. 698. action lies, unless the import of the words be a charge of want of  
1 Rol. Abr. integrity; for, although a person cannot help his want of ability,  
65. he may his want of integrity.

Cro. Jac. Wherever words in themselves not actionable become so, by  
557. Fleet- being published of a person in an office, it must appear from the  
wood v. Curl. words themselves, or from the pleadings, that they were published  
Hedl. 167. concerning him as an officer; for the ground of such words being  
1 Lev. 280. actionable, is the prejudice to a person in his office.  
Ld. Raym.  
1360.  
1 Stra. 618. 2 Stra. 1163.

## 1. To a Person in a judicial Office.

An action lies for publishing these words of a Lord Chief Baron, *My Lord Chief Baron cannot hear of one ear.* Hetl. 167. Alleston v. Moor.

An action lies for publishing these words of a justice of the peace, *He is a common barterer.* Hob. 140. Thornton v. Jobson. 1 Rol. Abr. 59.

So, for publishing these words, *He is a corrupt man.* 1 Rol. Abr. 57. Bishop of Coventry v. Wortiy.

So, for publishing these words, *He is a forsworn justice.* 1 Lev. 280. Carne v. Ofgood.

So, for publishing these words, *He is a false justice.* Cro. Eliz. 358. Wright v. Moorhouse.

So, for publishing these words, *He is but a half-eared justice, he will hear but one side.* Cro. Car. 223. Matham v. Bridge.

So, for publishing these words, *I have often been with him for justice, but never could get any at his hand but injustice.* Cro. Car. 14. Itham v. York.

So, for publishing these words, *He did for malice and spleen many times wrest the law, and pervert justice to serve his own turn.* Cro. Jac. 240. Beaumont v. Hastings.

So, for publishing these words, *He is a debauched man, and not fit to be a justice of peace.* 1 Rol. Abr. 48. Hammond v. Kingmill.

So, for publishing these words, *He covereth and hideth felonies, and is not worthy to be a justice of peace.* 4 Rep. 16. Stuckley v. Bulhead.

So, for publishing these words, *He is a rogue, a rascal, a villain, and a liar.* 3 Mod. 270. Aiton v. Blagrove. Lord Raym. 1369.

But no action lies for publishing these words of a justice of peace, *He is an ass, and a beetle-headed justice*; because these words import only want of ability. Salk. 615. How v. Prinn. [See 3 Will. 186.]

No action lies for publishing these words of a justice of peace, *He is a bloodsucker*; for it cannot be intended, what blood he sucked. Cro. Eliz. 306. Hilliard v. Constable.

If the actionable words published of a justice of peace, appear to have been published concerning his office of a justice of the peace, it is not necessary to allege, that at the time of publishing the words there was a colloquium concerning his office. 1 Lev. 280. Carne v. Ofgood.

Wherever words, for publishing of which an action would lie, are spoken to a justice of peace, when he is in the execution of the office of justice of the peace, the speaker may be proceeded against by indictment or information. Stra. 420. 1154. Comb. 46. 65, 66.

In an action brought by J. S. who had pronounced a sentence as judge of a court of Admiralty, for publishing these words, *The said sentence was given corruptly*, it was holden, that the action lay; although it was not averred, that the sentence was given cor- Cro. Eliz. 305. Caesar v. Curiensy.

ruptly by J. S. ; and by the court—It must be intended, that the words were published of J. S. who gave the sentence.

2. *To a Person in an Office of Trust.*

Hob. 140. An action lies for publishing these words of a person in a public office, *He is a common barrator.*  
 Thornton v. Jooon.  
 1 Rol. Abr. 59.

Cro. Jac. 65. So, for publishing these words of a commissioner for examining witnesses in a cause in the court of Chancery, *He is a corrupt man.*  
 Moor v. Foster.

1 Rol. Abr. 56. So, for publishing these words of such commissioner, *He hath taken bribes to favour one of the parties.*  
 Moor v. Foster.

1 Rol. Abr. 57. So, for publishing these words of such commissioner, *He hath altered the depositions that were taken.*  
 Parker v. Large.

1 Rol. Abr. 58. If these words are published of a churchwarden, *He hath cheated the parish*, an action lies ; for the words import a misbehaviour in an office of trust.  
 Strode v. Holmes.  
 Cro. Eliz. 358.

1 Rol. Abr. 56. If these words are published of the steward of a court, *He hath wronged me in his court, and hath not performed his office according to law*, an action lies ; a charge of great misbehaviour in an office of trust being thereby imported.  
 Powell v. Cove.

Cro. Car. 4<sup>th</sup>. If these words are published of a bailiff, or of any servant who is to account for money received, *He is a cozening knave to the person who employs and confides in him*, an action lies ; for the words amount to a slander in an office of trust.  
 Seaman v. Bigge.

Onslow v. Heme, 3 Will. 177. [But these words spoken of a member of parliament, *As to instructing our members to obtain redress, I am totally against that plan ; for as to instructing Mr. Onslow, we might as well instruct the winds ; and should he even promise his assistance, I should not expect him to give it us*, were holden not to be actionable.]  
 Bl. Rep. 753. S. C.

[ 4. Words which are disgraceful to a Person of a Profession or Trade.

Words in themselves not actionable become so, whenever any person is thereby disgraced in his profession or trade ; for although it may be difficult to prove the special damage received from them, nothing is more clear, than that such words have a direct and certain tendency, to injure the person of whom they are published.

2 Saund. 307. But in all actions for words of this kind, it must appear from the words themselves, or from the pleadings, that at the time of publishing the words there was a colloquium concerning the profession or trade of the person of whom they were published.  
 Stra. 696. 1169.  
 Cro. Jac. 557.  
 Salk. 694.

## 1. To a Clergyman.

An action lies for publishing these words of a clergyman, *He is a drunkard*; drunkenness being an offence for which a clergyman is liable to be deprived of his preferment. All. 63. Dudd v. Robinfon.

So, for publishing these words, *He preacheth nothing but lies and malice in the pulpit.* 3 Lev. 17. Cranden v. Walden. 1 Roll. Abr. 58.

So, for publishing these words, *He is a rogue and a dog, and will never be good till he is three feet under ground, I had rather my son should make hay on a Sunday than go to hear him preach.* Comb. 253. Pocock v. Nash.

So, for publishing these words, *He is an old rogue, and a contemptible fellow, and hated and despised by every body.* Str. e46. Musgrave v. Bovey.

## 2. To a Physician or a Surgeon.

If a barrister bring an action for the publication of words, which are disgraceful to him in his profession, it must be averred, that, at the time of publishing the words, he was a practising lawyer; for, unless he were at that time a practising lawyer, he could not be injured by the words. 2 Vent. 28. King v. Lake [Qu. Whether any action will properly lie for

words spoken of physicians and barristers, their fees being merely honorary, and not demandable in a court of law.]

There has been, perhaps, no determination upon the point; but it seems equally necessary, that, if a physician bring an action for the publication of words, which are disgraceful to him in his profession, he should aver, that, at the time of publishing the words, he was a practising physician.

An action lies for publishing these words of a doctor of physick, *He is no scholar*, without averring, that, at the time of publishing the words, there was a colloquium concerning his profession; because no man can be a good physician, unless he be a scholar. 1 Roll. Abr. 54. Cawdry v. Chickley. Cro. Car. 270.

So, for publishing these words, *He is an empirick and mountebank.* 1 Roll. Abr. 54. Goddard v. Haselfoot.

So, for publishing these words, *He is a quacksalver.* 1 Roll. Abr. 54. Allen v. Eaton.

It has been holden, that no action lies for publishing these words of a physician, *He hath killed a patient with physick*, unless it be added, that he did it knowingly and willingly; for, as a physician may mistake a case, and undesignedly give improper medicines, these words are no disgrace to him in his profession. Cro. Eliz. 620. F. Mounf. M. 40 Eliz.

This determination was contrary to the opinion of *Clinch, J.* and the reason upon which it is founded is not apparent. It is certainly a disgrace to a physician in his profession, to have it believed, that a patient died by taking improper medicines, prescribed by him; and, by comparing this case with some later cases, it seems clear, that words, which imply ignorance in the art a person professes, are actionable.

Win. 40. It is laid down in one case, that an action lies as well for publishing words, which import a want of knowledge in a person of a profession, as for words which import a want of fidelity.  
Auditor  
Curl's case.  
M. 20 Jac.  
[For imputation of ignorance to one in a profession, I think, an action will certainly lie. *Per De Grey, C. J.* 3 Will. 186.]

Hetl. 69. In another case it is laid down, that an action lies for publishing these words of a surgeon, who had *J. S.* under his care, *He killed J. S.*, although it be not averred, that he did it knowingly or voluntarily.  
Watson v.  
Vanderlath,  
M. ch. 3 Car.

11 Mod. And in another case it is laid down, that an action lies for publishing these words of an apothecary, *He killed a patient with his physick.*  
221. Tutter  
v. Alsin,  
Pasch.  
& Ann.

Hetl. 175. No action lies for publishing these words of a surgeon, *He poisoned the wound of J. S.*, for it might be proper in order to cure the wound, to do this.  
Suegoz's  
case.

1 And. 258. But, if these words are published of a surgeon, *He poisoned the wound of his patient for gain of money*, an action lies.  
Ca. 277.

### 3. To a Barrister or an Attorney at Law.

2 Ventr. 28. If a barrister bring an action for the publication of words, which are a disgrace to him in his profession, he must aver, that at the time of publishing the words, he was a practising lawyer; for if he were not at that time a practising lawyer, he could not be injured by the words.  
King v.  
Lake,  
Styles, 231.

Poph. 207. A barrister, who brings such action, must also aver, that, at the time of publishing the words, he was *homo conciliarius & eruditus in lege*; it not being sufficient to aver, that he was *homo eruditus in lege*.  
Cary's case.

Co. Entr. An action lies for publishing these words of a barrister, *He has deceived his client, and revealed the secrets of his cause.*  
22. Snag v.  
Gray. 1 Roll. Abr. 57.

2 Ventr. 28. So, for publishing these words, *He will give you vexatious council, and then milk your purse and fill his own pocket.*  
King v.  
Lake.

1 Roll. Abr. So, for publishing these words, *He is no lawyer, he cannot make a lease; they are fools that go to him for law.*  
54. Banks  
v. Allen.

Cro. Car. So, for publishing these words, *He is a dunce, and will get nothing by his profession.*  
382. P.ord  
v. Johns. 1 Roll. Abr. 55.

1 Lev. 297. An action lies for publishing these words of an attorney at law, *He cannot read a declaration.*  
Powell v.  
Jones.

Sid. 327. So, for publishing these words, *He has no more law than Mr. C.'s bull, or no more law than a goose.*  
Baker v.  
Morfue.

Day v. [So, for these words, *What, does he pretend to be a lawyer? He is no more a lawyer, than the devil.*]  
Buller.  
3 Will. 59.

So,



So, for publishing these words, *He will overthrow his client's cause.* Cro. Eliz. 589.  
Martyn v. Burling.

So, for publishing these words, *He is well known to be a corrupt man, and to deal corruptly.* 4 Rep. 16.  
Byrchley's case.

So, for publishing these words, *He is a cheat.* Hetl. 167.  
Allston v. Moor. 1 Roll. Abr. 53.

So, for publishing these words, *He is a rogue.* 1 Roll. Abr.  
52. Shaw v. Wakeman.

So, for publishing these words, *He is a common barretor.* Cro. Eliz.  
171. Proud v. Hawes. Hob. 140.

So, for publishing these words, *He is a knave.* 1 Roll. Abr.  
52. Nicholls v. Webb. 1 Freem. 277.

So, for publishing these words, *He is an extortioner, and one told me he cozened him of ten pounds in a bill of costs; it being contrary to the oath of an attorney, to be guilty of mal-practice.* 1 Roll. Abr.  
55. Stanley v. Boswell.

So, for publishing these words, *He stirreth up suits, and once promised me, that if he did not recover in a cause for me, he would take no charges of me; because stirring up suits is barrettry, and undertaking a suit no purchase no pay is maintenance.* 1 Roll. Abr.  
54. Smith v. Andrews.  
Hob. 117.

So, for publishing these words, *He is a rogue for taking your money, and has done nothing for it, he is no attorney at law, and dares not appear before a judge; what signifies going to him, he is only an attorney's clerk and a rogue, he is no attorney.* Stra. 1138.  
Hardwick v. Chandler.

So, for publishing these words, *He is a common maintainer of suits, and a champertor, and I will have him thrown over the bar next term.* Hob. 117.  
Boxe v. Barnaby. 1 Roll. Abr. 55.

It has been holden, that an action does not lie for publishing these words of an attorney, *He made false writings*, because these words, it not being the business of an attorney at law to make writings, are no disgrace to him in his profession.

But it is probable, that an action would at this day lie, for publishing such words of an attorney; for, although it may not have been so heretofore, it is at this day usual for attorneys at law to make writings.

#### 4. To a Person professing an Art.

An action lies for publishing these words of a midwife, *Many have perished for her want of skill.* Cro. Car.  
211. How-  
er's case.

A. said to B., who intended to send his son to be under the care of C. a schoolmaster, *Put not your son to him, for he will come away as great a dunce as he went.* It was holden, that the words were actionable. Hetl. 71.  
Watson v. Vanderlaaf.

If these words are published of a land-surveyor, *He is a cheating knave*, an action lies; for, as land-surveying is an art wherein skill is required, these words touch a land-surveyor in his profession, and means of getting his living. Cro. Jac.  
504.  
Blunden v. Eustace.

## 5. To a Tradesman.

Salk. 694.  
Savage v.  
Robbery.  
2 Saund.  
307.  
Latch, 114.

1 Lev. 115. 250. 2 Lev. 62. Stra. 656. 1169. Ld. Raym. 1417.

1 Lev. 115. But, if it appear, from the words published of a tradesman, that  
250. they were published concerning his trade, it is not necessary to  
2 Lev. 62. aver, that, at the time of publishing them, there was a colloquium  
5 Mod. 398. concerning his trade.  
Str. 616.  
Ld. Raym. 1417.

2 Lev. 62. If these words are published of a tradesman, *Have a care of him*  
Holgate. *do not deal with him, he is a cheat, he has cheated all the farmers at*  
*E., and now he is come to cheat at F.,* an action lies, although it be  
not averred, that, at the time of publishing them, there was a  
colloquium concerning his trade; it being apparent, from the  
words, that they were published concerning his trade.

Ld. Raym. So, for publishing these words of a tradesman, *He is a sorry piti-*  
1480. *ful fellow, and a rogue; he compounded his debts at six shillings in the*  
Stanton v. *pound; although it be not averred, that, at the time of publish-*  
Smith. *ing them, there was a colloquium concerning his trade; for these*  
*words, published of a tradesman, must greatly lessen his credit,*  
*and be very prejudicial to him.*

Str. 898. In an action upon the case for publishing a libel, the plaintiff  
Harman v. declared, that he was a gunsmith, and that, it having been inserted  
Delany. in the *Craftsman*, that he had the honour to present the Prince of  
[Fitg. 121. *Wales* with a gun two feet six inches long, which would shoot as  
253. S. C. *far as one a foot longer, and to kiss his Royal Highness's hand,*  
1 Barnard. upon being appointed his gunsmith, the defendant, with intent to  
B. R. 229 scandalize him in his trade, published an advertisement in these  
438. S. C.] words, "Whereas there was an account in the *Craftsman* of  
" *John Harman, gunsmith, making guns two feet six inches long*  
" *to exceed any made by others of a foot longer, (with whom it*  
" *is supposed he is in fee,) this is to advise all gentlemen to be*  
" *cautious, the said gunsmith not daring to engage with any artist*  
" *in town, nor ever did make such an experiment (except out of*  
" *a leather gun), as any gentleman may be satisfied of at the*  
" *Cross Guns in Long-Acre."* It was holden, that an action lay  
for this advertisement.

Cro. Car. If an action be brought, for publishing words of a tradesman,  
282. Collis concerning his trade, it must be averred, that at the time of pub-  
v. Malin. lishing them he was in trade; for, if he were not at that time in  
trade, his credit could not be hurt by the words.

Cro. Jac. In an action for publishing words of a tradesman, upon the first  
222. Tuthill day of *May*, it was averred, that, for five years preceding the first  
v. Milton. day of *May*, the plaintiff had exercised the trade of a draper. It  
was objected, that it ought to have been averred, that he did exer-  
cise

cise the trade on the day the words were published: but by the court --It is well enough, for it shall be intended that he did.

It was holden, that an action lies for publishing these words of a limeburner, *He is a cheating knave*; and by the court—If slanderous words are published, concerning the trade of a tradesman, it is not material of how low a kind the trade is.

An action lies for publishing these words of any person who seeks his living by buying and selling, *He is a bankrupt knave, and not worth three halfpence*.

An action lies for publishing these words of a shoemaker, *He is a bankrupt*; for, as the gain of a shoemaker does not arise from manual labour only, but great part thereof from buying leather, and selling it again, when manufactured into shoes, he may be a bankrupt.

If a person bring an action for the publication of these words of him, *He is a bankrupt*, he must aver, that he seeks his living by buying and selling; for it is not sufficient to aver, that he gets divers gains by buying and selling.

An action lies for publishing these words of a tradesman, *He is a sorry pitiful fellow, and a rogue, and compounded his debts at five shillings in the pound*.

An action lies for publishing these words of a tradesman, *He is a pitiful fellow, and not able to pay his debts*.

So, for publishing these words, *He takes goods of his customers, and pawns them, and is not a man to be trusted*.

So, for publishing these words, *He is not able to pay sixpence in the pound to his creditors of their debts*.

An action lies for publishing these words of a leatherfeller, *He hath cozened you; he sold you lamb-skins for shamois-skin; do not go to him, for he will cozen you*, the words being a charge of a fraud in the course of trade.

An action lies for publishing these words of a goldsmith, *He is a cozening knave, he sold a copper chain for a gold one*.

An action lies for publishing these words of a tradesman, *He is a cheating old rogue, and has cheated the fatherless and the widow*.

An action does not lie for publishing these words of J. S., *He cozened J. N. in the sale of barley*, unless it be averred, that J. S. did seek his living by buying and selling barley; for, if he did not, he could not be injured by the words.

If these words are published of a blacksmith, *He cozened J. S. in a tire of wheels*, an action does not lie; for it might be in the price; and it may be said of every tradesman, who has sold a thing for more than it is worth, that *he cozened in the price of that thing*.

An action does not lie for publishing these words of a carpenter, *He has charged J. S. for forty days' work, and received the money for the work, that might have been done in ten days, and he is a rogue for his pains*.

1 Lev. 115.  
Terry v.  
Hooper.

Cro. Car.  
585. Squire  
v. Johns.

Cro. Car. 31.  
Crumpe v.  
Barne.

Sid. 299.  
Emmerson's  
case.

Ld. Raym.  
1480.  
Stanton v.  
Smith.

Carth. 330-  
Cook v.  
Tucker.

1 Roll. Abr.  
59. Porte  
v. Cook.

1 Roll. Abr.  
60. Smith  
v. Rockes.

1 Roll. Abr.  
63. Fair-  
bank v.  
Mason.

1 Roll. Abr.  
62. Peck's  
case.

Ld. Raym.  
1417. Lud-  
well v. Hole.

1 Roll. Abr.  
62. Bray v.  
Haynes.

1 Roll. Abr.  
55. Tick-  
nell v. Snel-  
ling.

2 Str. 797.  
Lancaster v.  
Fiench.

## (C) Some Words which become actionable by reason of the Damage received from them.

4 Rep. 17.  
Anne Davis's case.

IF *J. S.* have received a temporal damage, from the publication of these words of him, *He is a bastard*, an action lies; although the words, being only a spiritual defamation, are not in themselves actionable.

1 Roll. Abr.  
38. Humphries v. Strutfield.

In an action upon the case the plaintiff declared, that he was heir apparent to his father, who was seised in fee of land of the value of forty pounds a year; that it was the intention of his father to suffer this land to descend upon him; and that the defendant, with an intent to cause the disinheritation of the plaintiff, published these words of him, *He is a bastard*: by reason whereof the plaintiff's father had signified a design of disinheriting him. It was holden, that the action lay on account of the temporal damage.

Cro. Jac.  
213.  
Vaughan v. Ellis.

In an action upon the case the plaintiff declared, that land was settled upon his grandfather and the heirs of his body; that his father left divers sons, of which he is the youngest; that his elder brothers are living; that *J. S.* being about to purchase the land, did offer him a sum of money to join in a conveyance thereof; and that the defendant published these words of him, *He is a bastard*: by reason whereof, *J. S.* did now refuse to give him the money, for joining in a conveyance of the land, which he had before offered. Judgment being given for the plaintiff, a writ of error was brought in the Exchequer-chamber; in which it was assigned for error, that, as the plaintiff had not at the time of publishing the words any title to the land, the action does not lie. The judgment was affirmed; and by the court—Although the plaintiff had not at the time of publishing the words any title to the land, he is in possibility inheritable thereto. It does moreover appear, that by reason of the publication of the words, *J. S.* does now refuse to give the money to the plaintiff, for joining in a conveyance of the land, which he did before offer; and consequently the plaintiff has sustained a present damage.

4 Rep. 18.  
Gerrard v. Mary Dickenson.

In an action upon the case the plaintiff declared, that he was seised of the manor of *A.*, which was purchased by him in fee of *George Lord Audley*, that he was in treaty with *J. S.* for a lease of the manor at the rent of a hundred pounds a year; and that the defendant, knowing of the treaty, published these words, *I have a lease of the manor of A. for ninety years*, and did moreover publish a lease for ninety years, supposed to be made by the grandfather of *George Lord Audley* to *Edward Dickenson*, the defendant's late husband; which he affirmed to be a good lease, and offered to sell as such; whereas the truth is, that the lease was counterfeited by her husband, and that she knew the lease to be a counterfeit lease: by reason of which words, and the publication of the lease, *J. S.* did not proceed in the treaty for a lease. The defendant by her plea traversed, that she knew the lease to be a counterfeit lease.

Upon

Upon a demurrer to this plea, it was holden, that, as the defendant's knowledge of the lease being a counterfeit lease, is not traversable, it must be intended, that she knew the lease to be a counterfeit lease. It was moreover holden, that the action lay; because the treaty with *J. S.* for a lease was broken off by the defendant's words, and by her publication of the lease, as a good lease, which she knew to be a counterfeit lease.

In an action upon the case the plaintiff declared, that he was in treaty with *J. S.* for his manor of *D.*, and that during the treaty, the defendant spoke these words to *J. S.*, *Williams is worth nothing, and do you think the manor of D. is his? it is but a compact between his brother Thomas and him*: by reason whereof *J. S.* was deterred from proceeding in the intended purchase. A question arising, Whether, as the words were not spoken to *J. S.*, the action did lie? It was holden that it did; and by the court—If the title of a person to land be so slandered by words spoken, that he cannot make sale thereof, it is not material, whether words were spoken to the party, who was about to purchase the land, or to a stranger.

An action does not lie for the publication of words, whereby the right of a person to land is denied; although the sale of the land be thereby prevented; in case the speaker did, at the time of publishing the words, say, that he had himself a right to the land, notwithstanding the speaker had not in truth any right thereto; for if an action did in such case lie, no person could lay claim to land, or commence a suit for the recovery thereof, without being liable to an action.

But if, during a treaty for the sale of land by *J. S.*, words denying the right of *J. S.* to the land are published by *J. N.*, whereby the sale is prevented, an action lies, notwithstanding *J. N.* did at the time of publishing the words say, that *A. B.* had a right to the land; for, although it were lawful for *J. N.* to say, that he had himself a right to the land, it was not lawful for him to say, that *A. B.* had a right thereto.

An action does not lie for publishing these words of a clergyman, *He is an heretick*; the words being only a spiritual defamation: but, if it be averred, that by reason of the words he lost a benefice, to which he would otherwise have been presented, an action lies for the temporal damage.

An action does not lie for publishing these words of a single woman, *She is a bursten-bellied quean, and her guts hang down to her garters*; the words not being in themselves actionable: but, if it be averred, that by reason of the words she lost a marriage, an action lies.

An action does not lie for publishing words of a single woman, which amount to a charge of incontinence; the words being only a spiritual defamation: but, if it be averred, that by reason of the words she lost a marriage, an action lies for temporal damage (*a*).

temporal loss or damage ariseth from the imputation of the want of chastity, it is actionable; as to say, a woman is a whore in London, where she is subject to be whipped for whoredom; or to say that she is 10, where she holds an estate *dum sola et casta fuerit*. 1 Lev. 134. 3 Will. 137.]

2 Leon. 111.  
Williams v.  
Linford.

4 Rep. 18.  
Gerrard v.  
Mary Dick-  
enson.

Cro. Jac.  
165. Earl of  
Northum-  
berland v.  
Burt.

4 Rep. 17.  
Anne Da-  
vis's case.

Lit. Rep.  
193.  
Bridge v.  
Langford.

4 Rep. 17.  
Anne Da-  
vis's case.  
[(a) For  
wherever  
some certain  
or probable

Cro. Jac.  
323. Mat-  
thew v.  
Crofs  
Litch, 218.  
Cro. Jac.  
422.

An action does not lie for publishing these words of J. S., *He is a whoremaster, for he lay with Brown's wife, and had to do with her against a chair*; the words being only a spiritual defamation: but, if it be averred, that by reason of the words J. S. lost a marriage, an action lies for the temporal damage; a loss of marriage being as great a damage to a man as it is to a woman.

1 Roll. Abr.  
36. Norman  
v. Symons.

It was found by a special verdict, that the defendant had preferred a libel in the spiritual court against the plaintiff, in which she charged him with coming often to her in the night under a pretence of being a suitor to her for marriage, and lying with her, and getting her with child; that she afterwards falsely and injuriously, at the quarter-sessions, charged him with being the father of a child begotten upon her body; and that by reason thereof all persons of good credit did, and still do, refuse to suffer any woman of their daughters or relations to be joined with him in lawful wedlock. It was holden, that as it was not found, that the plaintiff had lost a particular marriage, the action did not lie; the charge, that all persons of good credit refused to let him marry into their families, being too general.

2 Lev. 261.  
Barnes v.  
Studd.

In an action for publishing these words of a single woman, *She was with child by J. S.*, it was averred, that by reason thereof she incurred the displeasure of her parents, and was in danger of being turned out of doors. It was holden, that the action did not lie; inasmuch as the words are not in themselves actionable, and it is not averred that the plaintiff lost a marriage.

In this case, the case of *Medhurst v. Balam*, 1 Roll. Abr. 35. in which an action had been holden to lie, for publishing these words of a single woman, *She is with child, and has taken physick for it*, by reason whereof she lost her reputation and the friendship of her neighbours, was denied to be law.

## (D) Certain Circumstances, which are to be regarded in the Construction of Words.

### 1. The Time when the Words were published.

**A**S the same words are not at all times understood in the same sense, words which were once actionable may not now be so; and on the other hand an action may now lie, for words, for which an action would not heretofore have been.

The consequence to an agent of doing the same thing may, at least in the eye of human law, which in punishing an action considers only how far society is thereby prejudiced, at different periods of time be very different. An act of witchcraft, heretofore a capital offence, is by a late statute declared to be no offence; and many offences are at this day felonies, which were formerly no more than trespasses. It follows, that the lying of action for the publication of words, which import the charge of an offence, does in a great measure, if not altogether, depend upon the state of the law as to that offence, at the time they were published.

The sense of the words, for which the action is brought, at the time they were published, is not only to be regarded, in construing them; but the rule of construing those words, which did at that time prevail, is likewise to be regarded.

In ancient times, actions for words were very rare; an action of this kind being seldom brought, except the slander was great, and of dangerous consequence. 4 Rep. 15.  
Stanhope v.  
Bath.

Afterwards, actions for words were brought so frequently, that the judges, in conformity to a very sensible maxim, *malitiæ hominum est obviandum*, made it a rule, to construe the words, *in mitiori sensu*.

As the mischief, notwithstanding this rule was carried very far, 21 Jac. c. 16. did continue, it was declared by a statute, "That in an action upon the case for slanderous words, if the jury do find or assess the damages under forty shillings, the plaintiff shall recover only so much costs, as the damages found or assessed amount unto."

After the making of this statute, actions upon the case for words grew less frequent; for, as the judges, for some time, adhered to the rule of construing the words *in mitiori sensu*, the injured party, instead of obtaining satisfaction, was frequently put to the expence of paying his own costs.

This being perceived, such licentiousness, both in speaking and writing, prevailed, that it became necessary for the judges, in conformity to the maxim, on which the contrary practice had been established, to encourage actions for words.

Of late years, the rule has been, to construe words in that sense, which is most natural and obvious; it having been found by experience, that, unless men can obtain a satisfaction by law, for the damage sustained from the publication of slanderous words, they will take it themselves. 10 Mod. 193.  
Harrison v.  
Thornborough.

## 2. The Place where the Words were published.

If words, which have a slanderous signification, in a certain place, are published in that place, an action lies; although it would not, for publishing the same words in another place.

If these words, *He is a daffidown-dilly*, are published of a barrister in the North of England, where the words *daffidown-dilly* signify *ambidexter*, an action lies. Cert. 214.  
Annison v.  
Blofield.

If these words, *He has strained a mare*, are published of J. S. in that part of the kingdom where the words, *strained a mare*, signify *carnally known a mare*, an action lies. Cro. Eliz.  
250.  
Coles v.  
Haviland.

If these words, *He is a healer of felons*, are published of J. S. in one of the western counties, wherein the words, *a healer of felons*, signify *a concealer of felons*, an action lies. Hob. 126.  
Anon.

If these words, *He is mainsworn*, are published of J. S. in one of the northern counties, wherein the word *mainsworn* signifies *perjured*, an action lies. Hob. 126.  
Slater v.  
Franks.

It is not necessary to ascertain the meaning of such English words, as have a local signification, by an averment; for it is to be presumed

presumed, that the judge, before whom the action for the words is tried, understands the meaning of such *English* words; and, if he do not, it may be learned from the witnesses.

### 3. The Language the Words were published in.

**1 Rol. Abr. 74+ Jones v. Dawkes.** An action does not lie for slanderous words, unless they were published in a language which was understood by some one person who heard them; for if the words were not understood by any person, no damage can be received from the publication thereof.

**Cro. Eliz. 855. Price v. Jenkins. Ib. 496.** But, if the meaning of the words were understood by one person, an action lies, although they were published in a foreign language; for the consequence is equally bad to the person to whom they relate, as if the words had been *English*.

**Hob. 126. Anon.** An action lies for publishing these words of *J. S.*, *He is an idoner*, the word *idoner* being a *Welsh* word, which, in *English*, means *perjured*.

**1 Rol. Abr. 59. Delaporte v. Cook.** If slanderous words are published of *J. S.* in the *French* language, an action lies.

**Hob. 126. Anon. [(a) Sed quare, for though it be indispensably necessary]** It is not necessary to shew by an averment, what the meaning of words published in a foreign language is in *English* (a), it being the duty of the judge, before whom the action for the words is tried, to receive information, as to the meaning of the words in *English*, from persons who know it.  
to set forth the original words, yet, it seems, the plaintiff should also translate them, and shew their application to him. *Zenobio v. Axtell*, 6 Term Rep. 163.]

### 4. The Occasion of publishing the Words.

**4 Rep. 14. Lord Cromwell's Case.** The occasion of publishing slanderous words is much to be regarded; for *sensus verborum ex causa dicendi accipiendus est*.

**Cro. Jac. 90. Brooke v. Montague. Trin. 3 Jac.** A barrister may, in pleading his client's cause, speak words, for which, if published on another occasion, an action would lie; for it is the duty of an advocate to say every thing he is informed of, which is material for his client, and an action would lie against him for not doing his duty: but, if an advocate speak slanderous words, which are not material to the issue, he is liable to an action.

In another report of this case, **1 Roll. Abr. 87.** it is laid down, that what an advocate says for his client, in mitigation of damages, is justifiable; although it be not precisely material to the issue.

**Hob. 328. Hughes's case. Pasch. 18 Jac.** In a subsequent case it was holden, that an action does not lie for any words spoken by an advocate for his client, in mitigation of damages; although the words were not directly material to the issue: because they were spoken in his profession, and for the good of his client.

Another



Another case, subsequent to both these, goes still farther. In this it is laid down, that no action lies against an advocate, for speaking slanderous words in defending his client's cause; it being his duty to speak for his client, and it shall be intended, that he spoke according to his instructions.

*Prick*, a clergyman, in preaching a sermon, recited the following story, out of *Fox's Martyrology*; namely, that one *Greenwood*, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God. An action being brought for these words, by *Greenwood*, who was present at the sermon, it was ruled by *Wray*, Ch. J. before whom the cause was tried, that, as the words had only been recited as a story, *Prick* was not guilty of publishing them maliciously; and he was found not guilty. The opinion of *Wray*, Ch. J. was afterwards affirmed to be good law; and judgment was given for the defendant.

### 5. The Intention in publishing the Words.

An action does not lie for the publication of slanderous words, if it appear, that the publisher had no intention to injure the person to whom they relate: *Quia quæ ad unum finem locuta sunt, non debent ad alium detorqueri.*

It was holden, that an action did not lie for publishing these words, *I have heard J. S. was hanged for stealing a horse*, because it appeared, that they were published out of concern, and not with an intent to slander *J. S.*

If *A.* say to *B.* *You are forsworn*, and *B.* reply, *Will you say I am perjured?* and *A.* answer, *Yes, if you will have it*, no action lies; for the explanation of the word *forsworn*, is rather drawn from *A.* than spoken with design.

An action does not lie for speaking these words, *I will give my mare a quarter of a peck of malt, and let her drink, and she shall pifs as good beer as J. S. a brewer brews*; for it shall be intended, that the words were spoken in jest, and not with intent to injure *J. S.*

[Nor will an action lie for a character of a servant communicated in confidence to one, who asks it from the former master or mistress.]

100. See St. 32 G. 3. c. 56.

### (E) In what Cases Words published in a Course of Justice are actionable.

TO prevent persons from being deterred, by the fear of actions, from doing what justice requires, words otherwise actionable, are not so when published in a course of justice.

Another reason may be given, why an action does not lie, for words published in a court of justice; namely, that if the words are not true, the publisher may be indicted for perjury.

It is in one case laid down, that an action does not lie for slanderous words, contained in a complaint in a course of justice, although it would for publishing the same words upon an extra-judicial occasion.

3 Leon. 133. It is in divers books laid down, that an action does not lie for  
 4 Rep. 14. slanderous words contained in a bill of indictment.  
 Cro. Eliz.  
 247. 1 Saund. 132.

1 Roll. Abr. If *A.* say to *B.* *I charge you with felony*, an action lies.  
 43. Bafy v. Child.

4 Rep. 14. But, if *A.* charge *B.* with felony before a justice of the peace,  
 Cutler v. an action does not lie; for, if an action did in such case lie, felons  
 Dixon. would frequently escape for want of prosecution.  
 Hob. 82.

1 Roll. Abr. If *J. S.* exhibit articles of the peace, in the court of King's  
 87. Bench, against *J. N.*, and *J. N.* being in court say in the hearing  
 Moulton v. of the court, *There is not a word of truth in these articles, and I will*  
 Clapham. *prove it by forty witnesses*, no action lies; although the words  
 2 Jon. 431. amount to a charge of perjury, the articles having been exhibited  
 upon oath; because they were said by *J. N.* in defence of him-  
 self.

Cro. Eliz. An action does not lie against a witness for speaking slander-  
 230. ous words, in giving evidence, this being in a course of justice.  
 Buckley v. Wood.

1 Roll. Abr. If a bailiff, having a warrant to arrest *J. R.* upon a writ issu-  
 43. ing out of the court of Chancery, make an affidavit, that he did  
 Aier v. arrest him, and that he was rescued by *J. S.*, and *J. S.* be there-  
 Redgwit. upon committed to the *Fleet*, no action lies; because the affidavit  
 4 Rep. 14. was made in a course of justice.

1 Saund. If *J. S.* after having presented a petition to the House of Com-  
 133. mons, in which slanderous words are contained, deliver printed  
 Lake v. copies thereof to the members of that house, no action lies; it  
 King. being agreeable to the order and course of parliament, to deliver  
 copies of such petitions.

4 Rep. 14. No action lies for slanderous words, contained in articles of the  
 Cutler v. peace; notwithstanding the person, against whom the articles were  
 Dixon. exhibited, was put to the expence of entering into a recognizance  
 for keeping the peace.

1 Roll. Abr. *A.* who had exhibited a libel in a spiritual court against *B.* for  
 33. defamation, produced *C.* as a witness. Hereupon *B.* made an al-  
 Weitover v. legation in writing, as the course of such court is, that *C.* was  
 Dabbinet. perjured in a cause between *E.* and *F.* at the assizes at *G.* in order  
 to prevent *C.* being admitted as a witness. It was holden, that,  
 as the court had jurisdiction in the original matter, an action did  
 not lie against *B.*, for that, if an action did in such case lie, it would  
 prevent the detection of bad witnesses.

4 Rep. 14. If *J. S.* had, when that court was in being, charged *J. N.* with  
 Buckley v. felony or piracy, by a bill in the court of Star-Chamber, an action  
 Wood. would have lain; because, as that court had no jurisdiction in  
 either of these offences, the exhibiting of the bill was not a pro-  
 ceeding in a course of justice.

Upon the whole it appears, that no action lies for the publica-  
 tion of slanderous words in a course of justice: but, if the publica-  
 tion be accompanied with any circumstance of malice, an action  
 upon the case in the nature of a writ of conspiracy lies; and it is  
 highly

highly reasonable such action should lie, otherwise a bad man would, under the pretence of doing what justice requires, have it in his power to publish the vilest slander.

(F) In what Cases Words in the past or future Tense are actionable.

IT is in the general requisite to the making of words actionable, that they should be in the present tense; but an action does sometimes lie, although the words are in the past or future tense. The distinction seems to be, that where it is probable, that the party, to whom the words relate, will receive the same or nearly the same damage from words in the past or future tense, as if they had been in the present tense, the words are actionable; but that where this not probable, they are not so.

An action lies for publishing these words of J. S. *He was perjured, or he hath committed perjury*; for a man may at any distance of time be prosecuted for perjury. 1 Roll. Abr. 39. Rayner v. Grimstone.

So, for publishing these words of J. S. *I think in my conscience, if he might have his will, he would kill the king*; for the words may be the occasion of his ruin. 1 Roll. Rep. 427. Sidnam v. Mayo. 1 Roll. Abr. 49.

So, for publishing these words of a tradesman, *He will within two days become a bankrupt*; for the words may ruin his credit. Latch, 114. Hill's case. 1 Roll. Abr. 49.

But no action lies for publishing these words of J. S. *He has had the pox*; for it is probable that he is cured, and then no person will avoid his company. Stra. 1189. Tayler v. Hall. 1 Roll. Abr. 48. [Vide supra acc.]

So none lies for publishing these words of a justice of peace, *He was a debauched man, and was not fit to be a justice of peace*; for he might formerly have been debauched and unfit, but may not be so now. 1 Roll. Abr. 48. Hammond v. Kingmill.

(G) How far Words must be affirmative, in order to render them actionable.

IN order to render words actionable, they must to a certain degree be affirmative; but it is not necessary that they should be directly so.

An action lies for publishing these words of J. S. *I think, or I dreamed he committed a certain felony*; for, although the words are not directly affirmative, J. S. may by reason of the words be arrested, upon suspicion of having committed that felony. Cro. Eliz. 348. Smith v. Wiscome.

So, for publishing these words, *I think in my conscience, if J. S. might have his will, he would kill the king*. Cro. Car. 407. Sidnam v. Mayo. 1 Roll. Abr. 49.

Oldham v. Peake. 2 Bl. Rep. 959. [So, for these words, *I am thoroughly convinced that you are guilty*, &c. for *I am thoroughly convinced* is equal to a positive averment; for a man only avers a thing, because he is convinced of the truth of it.]

Brownl. 3. Harris v. Adams. If *A.* speak these words to *B.* *If you had your deserts, you had been hanged for felony*, an action lies; for, although a condition be annexed, the words amount to a charge of felony.

1 Roll. Abr. 43. Hake v. Moulton. 16. pl. 5. But, if *A.* say to *B.* *Thou deservest to be hanged*, or *thou hast done that for which thou deservest to be hanged*, no action lies; for the words do not amount to a charge of any particular crime; they being only a general declaration of the opinion which *A.* entertains of *B.*

Cro. Eliz. 639. Redstone v. Pomfreit. 1 Lev. 261. An action lies for publishing these words of a woman, *She hath had a child, and if she hath not a child she hath made it away*, for they import a charge of murder.

Com. 267. Upton v. Fold. If these words are spoken to *J. N.* *You are as great a rogue as J. S. who stole quilts*, an action lies; for notwithstanding the words are comparative, they amount to a charge, that *J. N.* did steal quilts.

Cro. Jac. 687. Foster v. Browning. So, for saying to *J. N.* *You are as arrant a thief as any in England*.

Sid. 53. Dacy v. Clinch. So, for publishing these words, *As sure as God governs the world, and King James this kingdom, J. N. hath committed treason*.

1 Lev. 65. Orton v. Fuller. So, for publishing these words, *J. S. says I am a perjured rogue, he is perjured as well as I*.

2 Lev. 150. Snell v. Webbing. An action lies for publishing these words, *I know what I am, and I know what Snell is, I never buggered a mare*; for the words amount to a charge of buggery.

Ld. Raym. 1185. Speed v. Perry. Salk. 697. If *J. N.* speak these words to *J. S.* *You are a rascal and a villain; you have forgot since you lived in Black Bull-yard, there you could procure broad money for gold, and clip it when you had so done, and then the shears could go*, an action lies; for the words amount to a charge of having been guilty of clipping, the power to clip having been the same in any other place as in *Black Bull-yard*.

1 Roll. Abr. 48. Hunt v. Thumblethorpe, Cro. Jac. 563. If it be said to *J. S.* *When wilt thou bring home the nine sheep thou stolest from J. N.?* the words are actionable; for, although spoken interrogatively, they amount to a charge of stealing sheep.

12 Rep. 134. Earl of Northampton's case. An action lies for saying to *J. N.* *Did you hear that J. S. is guilty of treason?*

1 Roll. Abr. 50. Haywood v. Naylor. If *A.* the wife of *B.* be asked by *C.* *Why will you hang D.?* and she answer, *for breaking our house in the night, and stealing our goods*, the words are actionable; for, notwithstanding they are spoken in answer to a question, they amount to a charge of stealing goods.

An action lies for publishing these words, *I will prove, or I make no doubt to prove, that J. S. has committed a certain felony*; for the words amount to a much stronger affirmation, than if the words had been, *J. S. has committed a certain felony*.

1 Roll. Abr.  
50. Webb  
v. Poor.  
Cro. Eliz.  
569.

So, for saying to *A. Go tell B. he is a thief*.

Roll. Abr.  
80. Hendey's case.

So, for speaking these words to *J. S. You brought fire, to set the house which was burnt on fire*.

Hutton,  
123. Glasier  
v. Heliar.

An action lies for publishing these words of *J. S. He was whipped for stealing sheep*; for the words are tantamount to the words, *J. S. was convicted of stealing sheep*.

1 Roll. Abr.  
50. Chunley  
v. Hill.

It has been holden, that no action lies for publishing these words of *J. S. He is in gaol for horsestealing*; for an innocent person may be suspected and imprisoned.

Hob. 177.  
Steward v.  
Bishop.  
Trin. 14 Jac.

But it was holden, in a subsequent case, that an action lies for publishing these words of *J. S. I will bring him to gaol for stealing a mare*; inasmuch as they contain a charge of felony; and the case of *Stewart v. Bishop* was denied to be law.

1 Lev. 82.  
Crawford v.  
Middleton.  
M. 14 Car. 2.

[So, these words were holden actionable, *He was put into the roundhouse for stealing ducks at Crowland*, they being alleged to be spoken *falsely and maliciously*.]

Beaver v.  
Hides,  
2 Wils 300.

If *A. say to B. One of us two are perjured, and it is not I*; the words are as much actionable, as if *A. had said to B. you are perjured*.

1 Roll. Abr.  
75. Coe v.  
Chambers.

An action lies for publishing these words of *J. S. We will have him stand in the pillory, and have his ears for perjury*; for they amount to an affirmation, that *J. S. has been guilty of perjury*.

1 Roll. Abr.  
50. Pell v.  
Jellow.

So, for publishing these words of *J. S. He gave ten pounds to A. for forswearing himself in Chancery*; for they amount to a charge of subornation of perjury.

1 Roll. Abr.  
41. Ewer's  
case.

## (H) How far Words must be certain, in order to render them actionable.

**I**T is to a certain degree necessary, to the rendering of words actionable, that the meaning of the words be certain; and that the person, to whom the words relate, be described with certainty.

It is not actionable to publish these words of *J. S. He is no true subject of the king*; for the word *true* is of uncertain signification, and no person is so true a subject as he ought to be.

1 Roll. Abr.  
69. Smith  
v. Turner.

It has been holden, that an action does not lie for publishing these words of *J. S. He is a rebel*; inasmuch as a commission of rebellion may have issued against him from the court of Chancery.

1 Roll. Abr.  
69. Red-  
stone's case.

It has been holden, that no action lies, for publishing these words of *J. S. He has stolen furze*; for the publisher might mean furze growing, the stealing of which is only a trespass.

1 Roll. Abr.  
70. Gib-  
bert's case.  
M. 9 Car. 1.

But an action would, at this day, lie for such words, the person, who unlawfully cuts furze, having, by a statute made since this case, been rendered liable to the punishment of whipping.

15 Car. 2.  
c. 2.

Cro. Eliz. 888. Stunhope's case. It has been holden, that no action lies, for saying to *J. S. Thou gettest thy living by swearing and forswearing*; for, as a man may be entitled to the fines set upon persons guilty of perjury, the words do not import a charge of perjury.

1 Roll. Abr. 42. P. Richard v. Smith. It has likewise been holden, that if *A. say to B. Thou art forsworn, and dost take a false oath at the assize at Hertford*, no action lies; for the oath may have been taken in a private house, and not in a court.

8 Mod. 24. 4 Rep. 15. Id. Raym. 959. These two cases were determined, when the rule of construing words in *mitiori sensu* was carried very far: but there is no doubt, that it would, at this day, be holden, that an action would lie in both cases.

Cro. Eliz. 500. Frown v. Mitchell. No action lies for publishing these words of *J. S. He hath delivered untruths upon oath, in his answer to a bill in Chancery*, the charge being uncertain; for many things in the bill might not be material to the matter in question, and the giving of a false answer to such things was not perjury.

3 Leon. 231. Anon. { Sed vide *infra* (B. 4.) this case over-ruled. } No action lies for saying to *J. N. Thou hast forged my hand*, unless it be added, to what writing; the charge being too general.

1 Roll. Abr. 71. Brown v. St. John. No action lies for saying to *J. S. Thou hast committed burglary, in breaking his house, and taking his goods*, it being uncertain, as no person is named, whose house and goods were meant.

1 Roll. Abr. 81. Brown's case. If three men have given evidence, and *J. S. say to them, One of you three is perjured*, neither of them can maintain an action against *J. S.* it being uncertain which of the three *J. S.* did mean.

Cro. Jac. 167. Willeman v. Willeman. So, if these words are published by *J. N. One of my brothers is perjured*, no action lies; it being uncertain which of his brothers was intended.

(I) By what Means the Want of Certainty, sufficient to render Words actionable, may be supplied.

1. By the Intention of the Speaker.

THE want of certainty, sufficient to render words actionable, may, as to the meaning of the words, be supplied by the intention of the publisher.

1 Roll. Abr. 60. Roote v. Moyn. If these words are published of a woman, *She lay with a weaver in a ditch, and his breeches were down, and they were at it*, an action lies; inasmuch as the publisher must mean, that the weaver had carnal knowledge of her.

Cro. Jac. 470. Miller's case. 1 Roll. Abr. 65. An action lies for publishing these words of a woman, *She is a whore, and hath had the pox, and hath holes one may turn his finger in; Mr. Ring the apothecary gave her a drink for it; take heed how you drink with her*; the great pox being apparently intended by the publisher.

1 Roll. Abr. 67. Prickington's case. So, for saying to *J. S. Thou art a pockey rogue; and the pox haunts thee twice a year*; for, as only the great pox does more remarkably affect

affect persons therewith afflicted in the spring and fall, the speaker must mean that pox.

Upon a motion in arrest of judgment, for publishing these words of a barrister, *He is a dunce, and will get little by the law*, it was insisted, that although dunce signifies a person of slow parts, such person may have solid judgment; and that the other words do only mean, *that he will not give himself the trouble to practise the law*. Judgment was given for the plaintiff; and by the court—Words are to be construed in their usually received sense. The word *dunce*, in the common acceptation thereof, means *a person of dull apprehension, and not fit to be a lawyer*; and the obvious meaning of the words, *he will get little by the law*, is, *he will deserve to get little by the law*.

Cro. Car.  
382. Peard  
v. Johns.  
1 Roll. Abr.  
55.

It was insisted, in order to arrest of judgment, that these words, *Thou art a thief of every thing*, are not actionable; because, as the stealing of some things, for instance, of fruit growing on a tree, is not felony, a person cannot be a thief of every thing. Judgment was given for the plaintiff; and by the court—The publisher must mean, that the plaintiff was a thief of every thing, of which he could be a thief.

Stra. 142.  
Morgan v.  
Williams.

An action lies for publishing these words of *J. S.* *He is perjured*; for the intention of the publisher must be, to charge *J. S.* with having sworn falsely in a court of justice.

2 Bull. 150.  
Croford v.  
Blisse.

## 2. By an Averment.

The want of certainty, sufficient to render words actionable, may, as to the description of the person, to whom the words relate, be supplied by an averment; it being a maxim, that *certum est quod certum reddi potest*.

If these words are published, *That perjured rogue and villain Potter*, any person of the name of *Potter* may maintain an action; if it be averred, that, at the time of publishing the words, there was a colloquium concerning him; and that they were published of him.

1 Roll. Abr.  
85. Potter  
v. Loveday.

If these words are published, *Captain Nelson is a thief*, an action lies for *Robert Nelson*, if it be averred, that there was, at the time of publishing the words, a colloquium concerning him, and that they were published of him; it not being necessary to aver, that he was, at that time, a captain, or usually called so.

1 Roll. Abr.  
85. Nelson  
v. Smith.

If it be said by *J. S.* in a colloquium concerning six defendants to a bill in Chancery, *These defendants are those who helped to murder J. S.* any one of the defendants may maintain an action; if it be averred, that, at the time of speaking the words, there was such colloquium; and that he was one of the defendants.

1 Roll. Abr.  
75. Foxcroft  
v. Lacy.

If these words are published, in a colloquium concerning *J. S.* *Mr. Deceiver has deceived the king*, *J. S.* may maintain an action, if it be averred, that, at the time of publishing the words, there was such colloquium; and that he was, at that time, one of the king's receivers; although it be not averred, that, at the time of publishing the words, there was a colloquium concerning his office

Cro. Jac.  
587.  
Fleetwood  
v. Curle.  
1 Roll. Abr.  
57.

of receiver; for, as it is averred, that, at the time of publishing the words, he was one of the king's receivers, it shall be intended, that they were published concerning his office of receiver; and if an action could be avoided, by a trick of calling a person, Mr. *Deceiver*, instead of Mr. *Receiver*, slander would often go unpunished.

1 Roll. Abr. 81. Aith v. Gerish. If *A. B.* say to *C. D.* before whom *E. F.* is walking, *He that goeth before thee is perjured*, an action lies, if it be averred, that only *E. F.* was walking before *J. N.* at the time of speaking the words, and that they were spoken of him.

Cro. Jac. 444. Brown v. Lowe. 1 Roll. Abr. 79. If it be said by *J. S.* to *J. N.* *Thy master Brown hath robbed me*, any person of the name of *Brown*, if it be averred, that the words were spoken of him, may maintain an action, although it be not averred, that he was the master of *J. N.* of whom the words were spoken; for it shall not be intended, that *J. N.* had more than one master of the name of *Brown*.

Cro. Jac. 107. Wiseman v. Wiseman. In an action upon the case the plaintiff declared, that the defendant, being his natural brother, published these words of him, *My brother is perjured*. Upon a motion in arrest of judgment, *Yelverton, J.* was of opinion, that the action did not lie; and by him—Words, in order to render them actionable, ought to be so certain, as to the description of the person to whom they relate, that every person who hears them may know of whom they are published. The defendant may have several brothers; and it would be very unreasonable, that every one of them should maintain an action, by averring that the words were published of him. *Williams, J.* was of opinion, that the action lay; and by him—As the plaintiff has averred, that the words were published of him, and the jury have found the defendant guilty, the court is ascertained, that the words were published of the plaintiff. *Tanfield, J.* was likewise of opinion that the action lay; and by him—If the words had been, *One of my brothers is perjured*, an action would not have lain, because it would then have appeared to the court, that the defendant had more than one brother, and the want of certainty, to which brother the words related, would not have been cured by the averment and the verdict: but as it does not now appear to the court, that the defendant had any other brother than the plaintiff, and it is averred that the words were published of him, and the jury have found the defendant guilty, the plaintiff ought to have judgment. The cause being afterwards moved in full court, it was resolved by all the justices, that the action did lie; and judgment was given for the plaintiff.

Cro. Jac. 241. Beaumont v. Hastings. In an action upon the case, the plaintiff declared, that the defendant published these words of him, being a justice of the peace, *He for malice and spleen did many times wrest the law, and pervert justice, to serve his own turn*. It was objected, in order to arrest judgment, that it doth not with sufficient certainty appear, that the words were published of the plaintiff; it not being averred, that at the time of publishing them there was a colloquium concerning him. Judgment was given for the plaintiff; and by the court—It is the usual course, and sufficient, to aver, that the words were



were published of the plaintiff. The judgment was affirmed upon a writ of error.

In an action upon the case the plaintiff declared, that the defendant published these words of him, *He is a thief*. It was objected, in order to arrest judgment, that the words cannot be applied to the plaintiff more than to any other person; it not being averred, that at the time of publishing them, there was a colloquium concerning the plaintiff. Judgment was given for the plaintiff; and by the court—It is sufficient to aver, that the words were published of the plaintiff, and the jury by finding a verdict for the plaintiff, have found that the words were published of him, which helps the case; for otherwise, they would have found the defendant not guilty.

Cro. Jac.  
673.  
Smith v.  
Ward.

If it be averred, that, in a colloquium between the plaintiff and defendant, the defendant said, *Thou art a thief*, an action lies, although it be not averred, that the words were spoken of or to the plaintiff; for, as they were spoken in a colloquium between the plaintiff and defendant, it must be intended, that they were spoken to the plaintiff.

1 Roll. Abr.  
85. Bishop  
v. Fitzher-  
beir.

### (K) In what Cases doubtful Words are to be construed *in mitiori sensu*.

WHEREVER doubtful words will fairly bear one sense in which they are not actionable, and another in which they are, they ought to be construed in that sense in which they are not actionable.

1 Roll. Abr.  
71.  
Gardiner v.  
Spurdance.

The rule, of construing doubtful words *in mitiori sensu*, does not only coincide with the general tenderness of the *English* law; but it is authorized by the two following maxims, *Benignior sensus in generalibus & dubiis praeferendus. Verba sunt accipienda in mitiori sensu*.

No action lies for speaking these words to J. S. *Thou art a corn-stealer, and hast stolen my corn off my land*; for it is doubtful, whether the speaker meant corn cut, or corn growing; and by construing the words *in mitiori sensu* they mean corn growing, the stealing of which is only a trespass.

1 Roll. Abr.  
70. pl. 50.

No action lies for publishing these words of J. S. *He did burn my barn*; for that, by construing the words *in mitiori sensu*, they mean a barn which had no corn in it, nor was parcel of a mansion-house, the burning of which is not felony.

4 Rep. 20.  
Barham's  
case.

It has been holden, that no action lies for publishing these words of an innkeeper, *He is a maintainer of thieves, and keepeth none but thieves in his house, and I will prove it*; because the publisher did not add, that the innkeeper knew the persons whom he maintained to be thieves; for a person may have thieves in his house and maintain them without knowing them to be thieves, which is no offence.

Cro. Eliz.  
746. Ball  
v. Bridges.

It has likewise been holden, that no action lies for publishing these words of J. N. *He hath poisoned J. S. innuendo quendam J. S.*

Cro. Jac.  
343.

ad tunc

Jacob v.  
Mills.  
Hob. 6. S. C.

*adunc defunctum*, and it shall cost me a hundred pounds, but I will hang him; for the words *adunc defunctum*, besides being contained in the *innuendo*, can only relate to the time of the declaration, and consequently it is not averred that J. S. was dead at the time of publishing the words.

Cro. Jac.  
184. Holt  
v. Astrigg.

It has been holden, that no action lies for publishing these words, *Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head; the one part lay on one shoulder and another part on the other*: because it is not averred that the cook was killed; and by the court—Slander ought to be direct, against which there ought not to be any intendment: but in this case, notwithstanding the wounding, the cook may be living, and then it is only a trespass.

At the times the three last cases were determined, the rule of construing words *in mitiori sensu* was carried very far: but it is doubtful whether any one of them be at this day law.

### (L) In what Cases doubtful Words are not to be construed *in mitiori sensu*.

1 Roll. Abr.  
71.  
Gardiner v.  
Spurdance.  
Skin. 364.  
Somers v.  
Hicufe.

HOWEVER agreeable it may be to the general tenderness of the *English* law, that doubtful words should be construed *in mitiori sensu*, yet such construction is only to be made, where the meaning of the words, in the usual acceptation thereof, is doubtful; for, if in the usual acceptation of the words they are slanderous, a forced construction shall not be put upon them, in order to render them not actionable.

1 Roll. Abr.  
71.  
Gardiner v.  
Spurdance.

If it be said to a woman, *Thou hast poisoned thy husband, and I will justify it*, the words, if it be averred that her husband is dead, are actionable; for although it be possible, that she might give him poison involuntarily or ignorantly; or, that he might not die thereof; or, that he might live a year and day after taking it, these are foreign intendments; for the meaning of the words, in the usual acceptation thereof, is, that she gave him poison voluntarily, knowing it to be poison, and that he died thereof in a short time.

1 Roll. Abr.  
72.  
Gardiner v.  
Spurdance.

If these words are spoken to J. N. *Thou hast killed J. S.* an action lies; for although the killing may have been as an executioner or by accident, the words, in the usual acceptation thereof, mean a felonious killing.

Stra. 1130.  
Rivers v.  
Lite.

In an action for publishing these words, *You did shut up my sister and murder her, and I will prove it*; the judgment of the court of Common Pleas was for the plaintiff; and the judgment, notwithstanding many old cases were cited to the contrary, was affirmed in the court of King's Bench.

Cro. Car.  
510.  
Ceely v.  
Hofkins.

An action lies for speaking these words to J. S. *Thou art forsworn in a court of record*, although the speaker did not add, in giving evidence; for it shall not be intended, unless this be shewn in the pleadings, that J. S. was forsworn in ordinary discourse in some court of record.

Cro. Jac.  
118.

So for saying to J. N. *You have procured J. S. to come thirty miles to commit perjury before my Lord of Winchester, and have given him*  
ten

ten pounds for that purpose, although it be not averred that J. S. did commit perjury; or that the Bishop of Winchester was a person before whom it could be committed; for the words shall be taken in the worst sense.

If these words be spoken to J. S. *You have stolen my wood*, an action lies; for the word *wood*, according to the old rule, *Arbor dum crescit, lignum dum crescere nescit*, means wood cut down.

It has been holden, that an action lies for publishing these words, *John Baker stole my box wood and I will prove it*; and by Holt, Ch. J. "Wherever words tend to slander a man and to take away his reputation, I shall be for supporting actions for them, for the preservation of the peace. I remember a story told by Mr. Justice Twissden of a man who had brought an action for slanderous words, who, being in court when the rule for arresting judgment in the action was made absolute, declared in court, that if he had thought he should not have recovered in his action, he would have cut the defendant's throat."

Upon a motion in arrest of judgment in an action for words it appeared, that the words in one count were, *Thou art a sheepstealing rogue*; that the words in another count were, *It sounds every where that thou art a sheepstealer*; and that there was a general verdict. Judgment was given for the plaintiff; and by the court.—Divers old cases have been cited, in which it is laid down, that if words can be construed by the court in such sense as not to be actionable, they ought to be so construed: but it is at this day settled; that words are to be construed by the court in that sense wherein they are generally understood.

It was heretofore holden that an action did not lie for publishing these words, *I charge J. S. with felony for taking money out of my pocket, and I will prove it*: for that as the words do not expressly charge the taking to be felonious, it may be intended, that it was not a felonious taking.

But in a modern case, this case is expressly denied to be law; and by Holt, Ch. J. *Taking of money out of a person's pocket, must mean a felonious taking*.

If these words be spoken to J. S. *Thou didst violently upon the highway take my purse from me, and four shillings and two pence in it; and didst threaten to cut me off in the midst, but I was forced to run away to save my life*, an action lies; for, although it be not expressly said, that J. S. did rob the speaker, or that he took his purse feloniously, the words, in the common acceptation thereof, amount to a charge of a robbery.

An action lies for speaking these words of a widow, *I have had the use of her body*; for it shall not be intended, that the words mean the use of her body as a physician, or that she had done some bodily labour for the speaker; but the words shall be construed in their usual sense, which is very slanderous.

If these words are published of a woman, *She is a lewd and common woman of her body, and has the pox*, an action lies; it being apparent, that the speaker meant the French pox.

Harris v.  
Dixon.

Cro. Jac.  
166. Lo v.  
Sanders.

Ld. Raym.  
959. Baker  
v. Pierce.

Sayer, 265.  
Gardiner v.  
Atwater.

Hutt. 58.  
Mafon v.  
Thompson.  
2 Lev. 51.  
2 Ventr.  
213.

Ld. Raym.  
959. Baker  
v. Pierce.

Cro. Car.  
277  
Laurence v.  
Woodward.  
1 Roll. Abr.  
74.

Cro. Jac.  
162.  
Morrison  
v. Cade.

1 Roll. Abr.  
66- pl. 14.

## (M) In what Cases adjective Words are actionable.

**A**N action does not in the general lie for the publication of adjective words.

4 Rep. 19. If these words are published of *J. S.* *He is a seditious knave*, an action does not lie; because the words only import a charge of an inclination to be guilty of some seditious act, and such inclination is not punishable at the common law.

Cro. Jac. 600. Stamp v. White. If these words are published of *J. S.* *He is a thievish rogue*, an action does not lie; because the words do not import a charge of being a thief.

But, if adjective words are published, which import a charge of having been guilty of a criminal act, an action does lie.

1 Roll. Abr. 49. pl. 6. If these words are published, *I accuse J. S. of poisoning his aunt*, an action lies; because the words import a charge of having poisoned his aunt.

Sid. 373. If these words are spoken to *J. S.* *Thou art a bugging rogue, and I could hang thee*, an action lies; because the words import a charge of having committed the act of buggery.

1 Roll. Abr. 50. Churley v. Hill. If these words are published of *J. S.* *He was whipped about Taunton Castle for stealing sheep*, an action lies; because the words not only import a charge of having stolen sheep, but likewise that *J. S.* was convicted of that offence.

Sayer, 265. Gardiner v. Atwater. If these words are spoken to *J. S.* *Thou art a sheepstealing rogue*, an action lies; because the words import a charge of felony.

If adjective words are a disgrace to a person in an office, or to a person of a profession or trade, an action lies; although they do not import a charge of having done any act.

4 Rep. 19. If these words are published of a person in an office, *He is a corrupt officer*, an action lies; the words being a disgrace to him in his office.

Styles, 425. Walkenden v. Haycock. If these words are published of a tradesman, *He is in a breaking condition*, an action lies; because his credit, which is of the utmost consequence to a tradesman, may be thereby hurt.

## (N) In what Cases Words which import only an Intent are actionable.

4 Rep. 16. **I**T is said to have been determined, upon great deliberation, that no action lies for words which only import the charge of a purpose, or an intent to commit a crime; such purpose or intent not being punishable.

1 Roll. Abr. 51. Lock v. Lock. An action does not lie for publishing these words of *J. S.* *He keepeth men to rob me*, inasmuch as these words only import a charge of an intention to rob.

1 Roll. Abr. 51. Pett's case. And, for the same reason, an action does not lie, for speaking these words to *J. N.* *You would have killed me*.

If these words are published of a woman, *She would have cut her husband's throat, and did attempt to do it*, an action lies; for the attempt being a criminal act, the words are a great slander. 1 Roll. Abr. 51. Scot v. Hilliers.

An action lies for saying to *A. B. You are a rascal and a villain; you have forgot since you lived in the Black Bull-yard; there you could procure broad money for gold, and clip it when you had so done, and then the shears could go*; for, where the power to do an act is, by the words, confined to a particular place, they imply that the act was done, the power being the same in all places. Ld. Raym. 1185. Speed v. Parry. Salk. 695.

So, for publishing these words, *J. N. lay in wait on Shooter's-Hill to rob J. S.*, for the lying in wait was a criminal act. 1 Roll. Abr. 50. Lock v. Lock.

Upon a motion in arrest of judgment, in an action for publishing these words of *J. N. He would have robbed the house of J. S. if J. D. would have consented unto it; he persuaded J. D. unto it, and told him he would bring him where he should have money enough*; it was said, these words do not import any act, for which the plaintiff could be called in question. Judgment was given for the plaintiff; and by the court—The words are a great discredit and slander. Cro. Eliz. 710. Leverage v. Smith.

### (O) In what Cases disjunctive or copulative Words are actionable.

**I**F the words published of any person are in the disjunctive, and part thereof be not actionable, no action lies.

If it be said to *J. S. Thou hast stolen my mare, or didst consent to the stealing of her*, no action lies; because the latter words are not actionable. Cro. Eliz. 780. Grif-fith's case.

It was holden, that an action did not lie for publishing these words, *Sparham did steal a mare, or else Godwin is forsworn*, notwithstanding there was an averment, that *Godwin* never swore any such matter; and by the court—The words do not import a charge sufficiently direct to make them actionable. Cro. Jac. 530. Sparham v. Pye.

If some words, which are not actionable, be connected by a copulative with others which are so, an action lies.

If these words be published of *J. N. He did steal, and cozened seven quarters of my barley*, an action lies; notwithstanding the words, *he cozened seven quarters of my barley*, would not alone have been actionable. Win. 45. 102. Crompton v. Philpot.

### (P) In what Cases an Action does not lie, by reason of Repugnancy in the Words.

**A**S the ground of an action for publishing words is the damage to the person of whom they were published, it follows, that, if there be in the words themselves, or in what appears upon the record, such repugnancy, that no damage can ensue to the person of whom they were published, the words are not actionable.

1 Roll. Abr.  
74. b. pl. 1.  
Anon.  
Pasch.  
11 Jac.

It has been holden, that if a feme covert say to *J. S.* *You have stolen my goods*, the words are not actionable; because the words, inasmuch as a feme covert, who has no goods, cannot be robbed of any, are in themselves repugnant.

But the contrary has been holden, in two other cases; one of which was subsequent, the other antecedent to this case.

Cro. Eliz.  
279.  
Charnel's  
case, Pasch.  
34 Eliz.

In an action brought against husband and wife, for the publication of these words by the wife, *My turkeys are stolen, and Charnel hath stolen them*, it was objected, in order to arrest the judgment, that, inasmuch as the wife could have no turkeys, it could not be true that the plaintiff had stolen her turkeys; and consequently the words could not be any discredit to him. Judgment was given for the plaintiff; and by the court—The wife did charge the plaintiff with stealing turkeys; and if a person who had no horse were to publish these words, *J. S. hath stolen my horse*, the discredit would be as great to *J. S.* as if the publisher had had a horse; for every person who heareth the words, might not know, whether he had a horse or no.

Cro. Jac.  
600. Stamp  
v. White  
and wife.  
Mich.  
18 Jac.

In an action brought against husband and wife, for the publication of these words by the wife, *J. S. hath stolen my faggots*, it was objected, in order to arrest judgment, that the words are repugnant; inasmuch as a married woman cannot have any goods which can be stolen. Judgment was given for the plaintiff; and by the court—The words, which are to be understood according to common intendment, amount to a charge of stealing the husband's faggots; and wherever an action is brought, for words importing a charge of stealing goods, it is not material whose the goods were.

4 Rep. 16.  
Snagg v.  
Gee.

If in an action for words which import a charge of killing, it appear from the declaration, that the person who is said to have been killed is living, no action lies: inasmuch as it is no slander to any person, to charge him with having killed a person who is not dead; because there can be no danger from a prosecution in such case.

Cro. Jac.  
331. Barton  
v. Bell.

It has been holden, upon a writ of error in the Exchequer-chamber, that no action lies for speaking these words to *J. K.*, *Thou hast killed the servant of J. S.*, unless it be averred that some servant of *J. S.* was killed.

Cro. Eliz.  
569. 823.  
Sid. 53.  
1 Ventr.  
117. 149.

But in divers of the cases, some of which are antecedent, others subsequent to this case, it is laid down, that words importing a charge of having killed a person, are actionable; although it be not averred, that the person was killed; unless it appear from the words themselves, or from the record, that he is living.

(Q) In what Cases an Action lies for repeating Words which were published by another Person.

IT was heretofore the practice, in an action for repeating words, which had been published by another person, to aver, that the words were not published by that person.

In

In an action brought by a woman against *A.* for saying that *B.* had reported, *that he had had the use of her body*, it was averred that *B.* had never made such report.

Cro. Jac.  
162. *Morrison v. Cade*.

In an action brought by *Lewis* against *Walter* for these words, *Piers did say, that Lewis did say, that there was no prince in England*, it was averred, that *Piers* did never say, that *Lewis* did say, *there is no prince in England*.

Cro. Jac.  
406.  
*Lewis v. Walter*.

But in a modern case, upon a motion in arrest of judgment, these words, *Thou art a sheepstealing rogue, and farmer Parker told me so*, were holden to be actionable; although it was not averred, that farmer *Parker* did not tell the defendant so; and by *Dennison*, Justice—Such averment is by no means necessary; it not being material, whether farmer *Parker* did or did not tell the defendant so.

Sayer, 266.  
*Gardiner v. Atwater*.

(R) In what Cases actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by subsequent Words.

AS the intention of publishing words is to be collected from the whole words, it must sometimes happen, that the sense of words, which would have been actionable if no others had been published at the same time, is so changed by subsequent words, as to be rendered not actionable.

When this is the case, the subsequent words are said to be explanatory.

If these words are published, *Master Brittridge is a perjured old knave; and that is to be proved by a stake parting the land of J. S. and J. D.*, no action lies; for, although the former words would have been actionable, their meaning is so explained by the subsequent words, as to make it evident, that a false swearing in a court of justice was not intended.

4 Rep. 19.  
*Brittridge's case*.

If these words are spoken to *J. S.* *Thou art a thief; for thou hast stolen my apples out of my orchard*, no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass.

4 Rep. 19.  
*Brittridge's case*.

If it be said to *J. N.* *Thou art a thief; for thou tookest my beasts by reason of an execution, and I will hang thee*, no action lies; for, however the speaker might be mistaken as to the nature of the offence, it appears from the latter words, that the whole words only import a charge of a trespass.

1 Roll. Atr.  
51. *Wilk's case*.

If *J. S.* say to *J. N.* *Thou art a thief; and hast stolen my trees*, no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass.

Cro. Jac.  
674. *Smith v. Ward*.

If *J. S.* say to *J. N.* *Thou hast ravished a woman; and I will make thee stand in a white sheet*, no action lies; it appearing from the latter words, that only such offence as is punishable in a spiritual court was intended by the speaker.

Cro. Jac.  
666. *Ridges v. Mills*.

It must on the other hand sometimes happen, that the sense of words which would not have been actionable, if no others had

been

been published at the same time, is so changed by subsequent words, as to be rendered actionable.

When this is the case, the subsequent words are said to be accumulative.

1 Roll. Abr. 43. Allestry v. Mawdit. No action lies for speaking these words to *J. S.* *You are a rogue*: But, if the words had been, *You are a rogue of record*, an action would have lain; inasmuch as the whole words would then have imported a charge of having been convicted of a crime.

Cro. Eliz. 638. Redstone v. Elliot. 1 Roll. Abr. 69. No action lies for speaking these words to *J. N.* *Thou art a rebel*: But, if the words had been, *Thou art a rebel, and all that keep thee company are rebels, and thou art not the queen's friend*, an action would have lain; inasmuch as it would have appeared from the whole words, what kind of rebel the speaker intended.

1 Roll. Abr. 70. pl. 46. No action lies for saying to *A. B.* *Thou art forsworn*: But an action would have lain, if the words had been, *Thou art forsworn, and I will set thee on the pillory*; for it would then have appeared, that such forswearing was meant, as *A. B.* may be set on the pillory for.

3 Lev. 116. Maden v. Micocke. If these words are spoken to *J. S.* *Thou art a clipper, and thy neck shall pay for it*, an action lies; inasmuch as it appears from the whole words, that a clipper of money was intended.

Cro. Jac. 114. Minors v. Lecford. Hil. 3 Jac. Cro. Jac. 231. Gyer v. Ormsted. Trin. 7 Jac. It was, in two cases, holden, that for speaking these words to *J. N.* *Thou art a thief, for thou hast stolen a tree*, no action did lie; because the latter words were explanatory, and only shewed the reason of calling thief; but that, if the words had been, *Thou art a thief, and hast stolen a tree*, an action would have lain; inasmuch as the word *and* would have made two distinct sentences of the words, in which case the latter words would have been accumulative.

Hob. 331. Clerk v. Gilbert. Trin. 17 Jac. 1. But in a subsequent case, wherein these words were spoken to *J. N.* *Thou art a thief, and hast stolen twenty load of my furze*, it was holden, that no action did lie; and by the court—The words, *and thou hast stolen*, and the words, *for thou hast stolen*, according to the common acceptance of the words, mean the same thing.

Ld. Raym. 560. Baker v. Pierce. The doctrine laid down in the case of *Clerk v. Gilbert* has been since adhered to.

## (S) Of the Pleadings in an Action for Words.

### 1. In the general.

Cro. Jac. 647. Chamberlain v. White and another. Palm. 313. [2 Burr. 984.] IF two persons have published words, for which an action lies, an action cannot be maintained against them jointly; the publication of one not being the publication of the other.

Dyer, 19. Yelv. 129. Cro. Car. 512. If words, for which an action lies, have been published of two persons, they cannot join in an action against the publisher; the damage to one not being a damage to the other.



It is by the 21 Jac. 1. c. 16. enacted, "That all actions upon the case for words shall be brought within two years after the words spoken, and not after."

It has been holden, that this statute does not extend to an action for words, which become actionable by reason of the special damage received from them.

1 Sid. 95.  
Cro. Car.  
193.  
Salk. 206.

In the declaration in an action upon the case, it was alleged, that the defendant spoke of the plaintiff divers false and scandalous words, of which the tenor follows: *Thou art an arrant whore, and an old worm-eaten jade, and one of thy sides hath been eaten out with the pox.* It was holden, upon a motion in arrest of judgment, that the declaration is bad, because it is not alleged expressly, that the defendant spoke these words; and by the court—Some words, which would, perhaps, have rendered the rest not actionable, may have been omitted. It is sufficient to plead a deed or record by way of recital, because the recital may be compared with the deed or record: but, if there be a mistake in the recital of words spoken, no recourse can be had to any thing, by which the mistake may be corrected.

Cro. Eliz.  
857. Gar-  
ford v.  
Clark.

In the declaration in an action upon the case it was alleged, that the defendant spoke certain words, which were actionable; and then the declaration went on, *cumque etiam postea* the defendant spoke other words, which were likewise actionable. A verdict being found for the plaintiff, and entire damages being given, it was objected, in order to arrest the judgment, that the latter words are not alleged positively, but by way of recital; and divers cases were cited, where judgment had been arrested in actions of trespass; because it was only alleged, *cum* the defendant committed the trespass. Judgment was given for the plaintiff; and by the court—This being an action upon the case, and the former words being laid positively, the latter shall be intended to be positive. The words *cumque etiam* are, in divers dictionaries, said to mean the same as *porro*, and in that sense they are used by some of the best Latin authors.

3 Lev. 338.  
Cotteril v.  
Matthews.  
2 Lev. 193;

Upon a motion in arrest of judgment in an action upon the case, it was insisted, that it was only alleged in the declaration, that the defendant spoke *hec ficta falsa verba*; whereas it ought to have been alleged, *quod fiste & falso dixit*. The declaration was holden to be well enough.

1 Keb. 273.  
Motley v.  
Slaney.

A writ of error being brought upon a judgment, in an action for words in themselves actionable, it was assigned for error, that it is only alleged, that the words were spoken *falsely*; whereas it ought to have been alleged, that they were spoken *falsely* and *maliciously*; but by the court—This is no error, for such words imply malice.

Noy, 35.  
Mercer v.  
Sparks.  
Owen, 51.

It is sufficient to allege in the declaration in an action for words, that the defendant spoke the words *palam & publice*; for the words *palam & publice* imply that the speaking was *in presentia et auditu aliorum*.

Cro. Eliz.  
861. Taylor  
v. How.

2 Lev. 193.  
Mors v.  
Thacker.

If the plaintiff in an action upon the case declare for the speaking of two sets of words, and only the first set are alleged to have been spoken *in presentia & auditu quamplurimorum*, the *presentia & auditu quamplurimorum*, which is alleged as to the first set, shall go to the second.

Tindal v.  
Moore,  
2 Will. 114.

[In an action for several sets of words, the first set were these: *That rogue J. T. (meaning the plaintiff) that set the house on fire (meaning the summer-house that was burnt, in the occupation of one Mr. Cotton); and if any body will give me charge of him, I will carry him to New Prison.* The fifth set were these: *J. T. (meaning the plaintiff) set the house on fire (meaning the same house).* It was moved in arrest of judgment, that the latter set of words were not actionable, for that every count in a declaration is a substantive count, and the *innuendo (meaning the same house)* shall not relate to the summer-house mentioned in the first set of words. But by the court—Although the latter set of words be not of themselves actionable, yet they shall have relation to the former set; and we must take them to have been spoken *maliciously*, as the jury have found for the plaintiff.]

Cro. Fliz.  
486. Hall v.  
Henneley.  
Noy, 57.

If it be alleged in the declaration in an action upon the case, that the words were spoken *in presentia diverforum*, it is well enough; although it be not alleged, that the speaking was *in auditu diverforum*; for, as the words are alleged to have been spoken *in presentia diverforum*, it shall be intended, that they were spoken *in auditu diverforum*.

Bull.N.P. 5.

[If it be laid, that the defendant *in clauso ecclesie* Lichfield spoke the words, it has been holden, that the place not being laid as a *venue*, but as a description of the offence, it is a circumstance that must be proved. But, if the words are laid to be spoken before *A.* and others, it is sufficient to prove them to be spoken before others only.]

It is usual to allege in the declaration in an action for words, that the plaintiff is of good fame: but this is not traversable.

Stiles, 113.  
Strachey's  
case.

In the declaration in an action for words it was alleged, that the plaintiff was of good fame. The defendant pleaded, that, at the time of publishing the words, the plaintiff was not of good fame. The plea was holden to be bad; inasmuch as, it only answers to a matter of inducement, which did not require any answer.

4 Rep. 13,  
14. 19.  
Cro. Car.  
510.

As the sense of words is to be collected from the consideration of the whole words, and of all the circumstances which attended the publication of them, if any of the words, or any circumstance which attended the publication of them, be omitted in the declaration of the plaintiff, the defendant may in his plea set out such of these as are material for him.

2 Brownl.  
49. Styles  
v. Baxter.

In an action for calling the plaintiff *perjured man*, the defendant pleaded in his justification, that the plaintiff was *perjured* in a certain cause, and judgment was for him. Another action being brought by the plaintiff for the same words, the defendant pleaded this judgment in bar, and it was holden to be a good plea.

After judgment for the defendant in an action for these words, *He is a rascally alderman, a factious alderman, and a lampooner*, a second action was brought for the same words, with an averment, that the word *lampooner* means *libeller*. The defendant pleaded in bar, that a former action was brought for the same words, except that the word *lampooner* is, in the declaration in the present action, averred to mean *libeller*. Upon a demurrer to this plea, it was insisted, that, by the explanation of the word *lampooner*, the present action is become a different action: but by the court—As the plaintiff has been once barred in an action for the same words, he shall never entitle himself to another action by an explanation of one of the words.

1 Lev. 248.  
Gardiner v.  
Helmis.

If the words alleged in the declaration are not actionable, no additional words in the replication can make them so; for the defendant cannot rejoin to any words in the replication, which are not contained in the declaration.

Styles, 70.  
Anon.

[It was formerly holden, that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them. However, if the words be laid in the third person, *e. g. He deserves to be hanged for a note he forged on A.*, proof of words spoken in the second person, *e. g. You deserve, &c.* will not support the declaration: for there is a great difference between words spoken in a passion to a man's face, and words spoken deliberately behind his back.]

2 Roll. Abr.  
718.  
Avarillo v.  
Rogers.  
Bull N.P. 5.  
Rex v.  
Barry.  
4 Term Rep.  
217.

It is very dangerous for the defendant in an action for words to demur to the declaration; for he may, after taking the chance of trying the fact, avail himself of any matter in arrest of judgment, which would have been good upon a demurrer.

4 Rep. 14. a.  
Doct.  
pl. 186.

## 2. In what Cases an Averment is necessary.

It was heretofore doubted, whether an action did lie, for publishing words which import a charge of murder; unless there was an averment, that the person said to be murdered is dead.

Yelv. 21.  
Sid. 53.

But it has been long settled, that an action does lie, for publishing words which import a charge of murder; although it be not averred, that the person said to be murdered is dead; for that this shall be intended; unless it appear in the pleadings, that he is alive.

Cro. Eliz.  
569. 823.  
Cro. Car.  
489. Sid. 53.  
1 Ventr. 117.  
149.

In an action upon the case the plaintiff declared, that the defendant, being his natural brother, published these words of him, *My brother is perjured*. Upon a motion in arrest of judgment, *Yelverton, J.* was of opinion, that the action did not lie; and by him—Words, in order to render them actionable, ought to be so certain, as to the description of the person to whom they relate, that every person who hears them may know to whom they do relate. The defendant may have several brothers; and it would be very unreasonable, that every one of them should be able to maintain an action, by averring that the words were published of him. *Williams, J.* was of opinion, that the action lay; and by him—As the plaintiff has averred, that the words were published of him,

Cro. Jac.  
107.  
Wifeman v.  
Wifeman.

and the jury have found the defendant guilty, the court is ascertained, that the words were published of the plaintiff. *Tanfield, J.* was likewise of opinion that the action lay; and by him—If the words had been, *One of my brothers is perjured*, an action would not have lain, inasmuch as it would then have appeared to the court, that the defendant had more than one brother, and the want of certainty, to which of the brothers the words did relate, could not have been cured by the averment and the verdict: but, as it does not now appear to the court, that the defendant had any other brother than the plaintiff, and it is averred that the words were published of him, and the jury have found the defendant guilty, the plaintiff ought to have judgment. This cause being afterwards moved in full court, it was resolved by all the justices, that the action did lie; and judgment was given for the plaintiff.

1 Roll. Abr.  
85. Nelson  
v. Smith.

If these words are published, *Captain Nelson is a thief*, an action lies for *Robert Nelson*, if it be averred, that there was, at the time of publishing the words, a colloquium concerning him, and that they were published of him; it not being necessary to aver, that he was, at that time, a captain, or usually called a captain.

Cro. Jac.  
444.  
Brown v.  
Lowe,  
1 Roll. Abr.  
79.

If it be said by *J. S.* to *J. N.* *Thy master Brown hath robbed me*, any person of the name of *Brown*, if it be averred, that the words were spoken of him, may maintain an action, although it be not averred, that he was the master of *J. N.* of whom the words were spoken; for it shall not be intended, that *J. N.* had more than one master of the name of *Brown*.

Cro. Jac.  
473.  
Smith v.  
Ward.

In an action upon the case the plaintiff declared, that the defendant published these words of him, *He is a thief*. It was objected, in order to arrest the judgment, that the words cannot be applied to the plaintiff more than to any other person; it not being averred, that, at the time of publishing them, there was a colloquium concerning the plaintiff. Judgment was given for the plaintiff; and by the court—It is sufficient to aver, that the words were published of the plaintiff, and the jury, by finding a verdict for the plaintiff, have found that the words were published of him, which helps the case; for otherwise, they would have not found the defendant guilty.

1 Roll. Abr.  
85.  
Bishop v.  
Fitzherbert.

If it be averred, that, in a colloquium between the plaintiff and defendant, the defendant said, *Thou art a thief*, an action lies, although it be not averred, that the words were spoken of or to the plaintiff; for, as they were spoken in a colloquium between the plaintiff and defendant, it must be intended, that they were spoken to the plaintiff.

Cro. Jac.  
241.  
Beaumont  
v. Hailings.

In an action upon the case, the plaintiff declared, that the defendant published these words of him, being a justice of the peace, *He for malice and spleen did many times wrest the law, and pervert justice, to serve his own turn*. It was objected, in order to arrest judgment, that it doth not with sufficient certainty appear, that the words were published of the plaintiff; it not being averred, that at the time of publishing them there was a colloquium concerning him. Judgment was given for the plaintiff; and by the court—It is the usual course, and sufficient, to aver, that the words were published

published of the plaintiff. The judgment was affirmed upon a writ of error.

If these words are published, in a colloquium concerning *J. S.* *Cro. Jac. 557.*  
*Mr. Deceiver has deceived the king, J. S.* may maintain an action, *Fleetwood v. Curle. 1 Roll. Abr. 57.*  
 if it be averred, that, at the time of publishing the words, there was such colloquium; and that he was, at that time, one of the king's receivers; although it be not averred, that, at the time of publishing the words, there was a colloquium concerning his office of receiver; for, as it is averred, that, at the time of publishing the words, he was one of the king's receivers, it shall be intended, that they were published concerning his office of receiver.

As the cases are not reconcilable as to the point, whether an action lies for publishing disgraceful words of a tradesman concerning his trade, unless it be averred, that, at the time of publishing the words, the plaintiff did exercise the trade, it will be proper to mention the principal cases upon the point.

In one case it was holden to be sufficient for the plaintiff in such actions to aver, *Quod fuit mercator, per magnum tempus.* *Cro. Eliz. 273.*

*Jordan v. Lyster, Paich. 34 Eliz.*

In another case, wherein the plaintiff in such action declared, *Quod per multos annos jam retroactos fuit mercator*, the court doubted, whether, as it is not precisely alleged, it should be intended from the words, *Per multos annos jam retroactos fuit mercator*, that the plaintiff was a merchant at the time of publishing the words. *Cro. Eliz. 794. Dotter v. Ford. Trin. 42 Eliz.*

In another case, wherein the plaintiff in such action declared, that for five years preceding the first day of *May* he had exercised the trade of a draper, judgment was given for the plaintiff. It was objected upon a writ of error, that the declaration is not good; because it is not precisely alleged, that, at the time of publishing the words, the plaintiff was a draper. The judgment was affirmed; and the court agreed, that the following distinction taken by *Yelverton* was well founded; namely, that if an action be brought by a person in an office, which he holds during the king's pleasure, for words which are disgraceful to him in his office, it must be expressly alleged, that the plaintiff was in the office at the time the words were published; but that, if an action be brought by a person of a profession or trade, for words which are a disgrace to him in his profession or trade, it is sufficient to aver, that he has for some years past exercised the profession or trade; for it shall not be intended, that he has discontinued his profession or trade. *Yelv. 159. Tuthill v. Milton, Trin. 7 Jac. Cro. Jac. 222. S. C.*

In the last case, the case of *Gardener v. Hopwood, Trin. 38 Eliz.* was cited, in which it was holden to be sufficient, for a plaintiff in such action to aver in his declaration, *Quod per multos annos jam retroactos artem merchandizandi exercuit.*

In another case, wherein the plaintiff in such action declared, *Quod per magnum tempus usus fuit* the art of a drover; the declaration was holden to be bad; because it is not averred, that, at the time of publishing the words, the plaintiff was a drover. *Cro. Car. 282. Colli v. Malin, Mich. 8 Car. 1. Jon. 304. S. C.*

Sid. 425.  
Diake v.  
Hill, Mich.  
21 Car. 2.

In another case, wherein the plaintiff in such action declared that he had been a merchant for the space of twenty years, without adding the words, *last past*; the declaration was holden to be good; and by the court—It shall be intended, notwithstanding there are opinions to the contrary, that the plaintiff continued to be a merchant.

Salk. 694.  
2 Saund.  
307.  
Latch, 114.  
1 Lev. 115.  
250.  
2 Lev. 62.

It is in the general true, that an action does not lie for publishing disgraceful words of a tradesman concerning his trade, unless it be averred, that, at the time of publishing the words, there was a colloquium concerning his trade.

Stra. 696. 1169. Ld. Raym. 1417.

1 Lev 115.  
250.  
2 Lev 62.  
5 Mod. 393.  
Stra. 656.  
Ld. Raym. 1417.

But, if it appear from the words published of a tradesman, that they were published concerning his trade; it is not necessary to aver, that, at the time of publishing them, there was a colloquium concerning his trade.

2 Lev. 62.  
Reeve v.  
Holgate.

If these words are published of a tradesman, *Have a care of him, do not deal with him, he is a cheat, he has cheated all the farmers at E., and now he is come to cheat at F.*, an action lies; although it be not averred, that, at the time of publishing them, there was a colloquium concerning his trade; it being apparent from the words, that they were published concerning his trade.

3 Roll. Abr.  
71. Brown's  
case.

If three men have given evidence at a trial, and J. S. say to them, *One of you three is perjured*, no action lies; for there is in these words such a total want of certainty that it cannot be cured by any averment.

3 Roll. Abr.  
85.  
Foxcroft  
v. Lacy.

But, if in a conversation concerning six defendants to a bill in Chancery, it be said by J. S. *These defendants are those who helped to murder J. N.*, every defendant may maintain an action, if it be averred, that, at the time of speaking the words, there was such colloquium, and that he was one of the defendants.

Cro. Jac.  
331.  
Radcliffe v.  
Michael.

No action lies for saying to J. N. *You are as bad as your wife, when she stole my cushion*; unless it be averred, that the felony alluded to was committed.

Com. 267.  
Upton v.  
Pinfold.

So, no action lies for saying to J. S. *You are as great a rogue as J. N. who stole quilts*, except it be averred, that J. N. did steal quilts.

Cro. Jac.  
687.  
Foster v.  
Browning.  
Hutt. 73.

It has been holden, that no action lies for publishing these words of J. S. *He is as arrant a thief as any in England*, unless it be averred, that there is a thief in England.

Sid. 53.  
Dacy v.  
Clinch.

But this case does not seem to be law; for it is laid down in another case, that if these words are spoken to J. N. *As sure as God governs the world, or King James this kingdom, you are a thief*, an action lies; although it be not averred, that God governs the world, or King James this kingdom; because a thing so apparent as either of these is need not be averred.

3 Lev. 65.  
Orton v.  
Fuller.

If J. N. have published these words, J. S. says *I am a perjured rogue, he is a perjured rogue as well as I*, J. S. may maintain an action,

action, without averring, that the defendant is a perjured rogue; for the words, *as well as I*, amount to a confession of his being so.

If these words are published of *J. N. He robbed the Hockley butcher*, there is no necessity to aver, in the declaration in an action brought by *J. N.*, that there was a *Hockley* butcher; for the words themselves imply that there was.

[In an action for these words, *Mr. Purdy gave 200 l. for his warrant to be purser of the Magnanime*, (a man of war,) judgment was arrested, because the charge, as laid, was so loose, that it did not of itself import a crime: there was nothing to shew to whom the money was given; and as it was not averred, the court could not intend it.]

It is not necessary to aver what the meaning of words published in a foreign language is in *English*; it being the duty of the judge, before whom the cause is tried, to inform himself of this from those who understand it.

It is not necessary to ascertain the meaning of such *English* words, as have a local signification, by an averment; for it is to be presumed, that the judge, before whom the cause is tried, does understand the meaning of such *English* words; and, if he do not, it may be learned from the witnesses.

### 3. In what Cases a Colloquium is necessary.

A colloquium is a conversation, which was had at the time of publishing the words for which an action is brought.

It is in the general true, that an action does not lie for words, on account of their being disgraceful to a person in his office, profession, or trade; unless it be averred, that, at the time of publishing the words, there was a colloquium concerning the office, profession, or trade of the plaintiff.

In an action upon the case the plaintiff declared, that he was a draper, and that he gained his living by buying and selling cloths and other goods; and that the defendant, intending to slander the plaintiff in his good name and credit, spoke these words to him, *You are a cheating fellow, and keep a false book; and I will prove it.* It was objected, in order to arrest the judgment, that it is not averred, that, at the time of speaking the words, there was a colloquium concerning the plaintiff, or concerning his dealing by way of buying and selling; and, consequently, that the words are not disgraceful to him in his trade. Judgment was arrested.

In an action upon the case the plaintiff declared, that he was a trader; and that the defendant spoke these words to him, *You are a cheat, and have been a cheat for divers years.* Upon the first motion in an arrest of judgment, *Holt*, Ch. J. was of opinion; that, as the words must be understood of the plaintiff's way of living, it was not necessary to aver, that, at the time of publishing them, there was a colloquium concerning the trade of the plaintiff; but he afterwards changed his opinion, and judgment was arrested.

Stra. 1169.  
Davis v.  
Miller.

It was holden, than an action did not lie for speaking these words to the plaintiff, *You cheated the lawyer of his linen, and stood bawd to your daughter to make it up with him; you cheat every body; you cheated me of a sheet; you cheated Mr. Saunders, and I will let him know it; because it is not averred, that, at the time of publishing the words, there was a colloquium concerning the trade of the plaintiff.*

Ld. Raym.  
1417.  
Ludwell v.  
Holc.

In an action upon the case the plaintiff declared, that the defendant spoke these words to him, *You are a cheating old rogue, and have cheated the fatherless and widow.* Judgment was arrested; because it is not averred, that at the time of publishing the words there was a colloquium concerning the trade of the plaintiff.

But, if an action be brought for words, on account of their being disgraceful to a person in his office, profession, or trade, and it appear from the words themselves, that they are disgraceful to the plaintiff in his office, profession, or trade, the action lies; although it be not averred, that, at the time of publishing the words, there was a colloquium concerning the office, profession, or trade of the plaintiff.

1 Lev. 280.  
Carne v.  
Osgood.

In an action upon the case the plaintiff declared, that the defendant published these words of him, being a justice of the peace, *He is a forsworn justice, and not fit to sit upon the bench.* Upon a motion in arrest of judgment it was said, that it is not averred, that, at the time of publishing the words, there was a colloquium concerning the office of the plaintiff as a justice of the peace. Judgment was given for the plaintiff; and by the court—Such averment is not necessary; it appearing from the words themselves, that they were published concerning his office, as a justice of the peace.

1 Roll. Abr.  
54. Cawdry  
v. Chickley.  
Cro. Car.  
270. S. C.

An action lies for publishing these words of a doctor of physick, *He is no scholar; although it be not averred, that at the time of publishing the words, there was a colloquium concerning his profession; because no man can be a good physician, unless he be a scholar.*

2 Lev. 62.  
Reeve v.  
Holgate.

If these words are published of a tradesman, *Howe a care of him, and do not deal with him; he is a cheat, and will cheat you; he has cheated all the farmers at Epping, and now he is come to cheat Hatfield,* an action lies; although it be not averred, that, at the time of publishing the words, there was a colloquium concerning the plaintiff; it being apparent from the words themselves, that they were published concerning his trade.

Ld. Raym.  
1480.  
Stanton v.  
Smith.

In an action upon the case the plaintiff declared, that he is a brewer, and has always paid his debts to the full, without any compounding; and that the defendant, intending to bring the plaintiff into discredit, published the following words of him, *He is a sorry pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound.* Upon a demurrer it was argued, that, the words are not actionable; because it is not averred, that, at the time of publishing them, there was a colloquium concerning the trade of the plaintiff. Judgment was given for the plaintiff; and by



by the court—As the publishing of such words of a tradesman must greatly lessen his credit, they must be very prejudicial to him.

#### 4. What is the Use of an *Innuendo*.

Nothing, which would otherwise remain uncertain can be reduced to certainty by an *innuendo*; for the word *innuendo*, which means the same as the word *aforsaid*, can only refer to something that is before certain.

No issue can be joined upon the truth of words, which are contained under an *innuendo*; because such words are never an express averment.

If it be averred in the declaration in an action upon the case, that the defendant published these words, *One of the servants of J. S. innuendo J. N. a servant of J. S. is a thief*, the action does not lie; for, as it is not averred, that the words were published of *J. N.* or that there was, at the time of publishing them, a colloquium concerning him, it shall not be collected from the *innuendo*, that he was the person intended by the publisher.

If it be averred in the declaration in an action upon the case, that the defendant published these words of *J. N. He did burn my barn*, innuendo *a barn with corn in it*, the action does not lie; because the words, *He did burn my barn*, are not actionable; it not being felony to burn a barn which has no corn in it, unless it be parcel of a mansion-house, and what is contained under the *innuendo* shall not make them so.

An action would, perhaps, at this day lie, for words which import a charge of having burned a barn, although the burning be not felony: but, be that as it may, this case applies strongly to the point for which it is adduced; namely, that, as the barn does not appear, without the help of the *innuendo*, to have been a barn with corn in it, it shall not be from thence collected, that it was such barn.

If it be averred in the declaration in an action upon the case, that the defendant published these words of *J. S. He hath forsworn himself*, innuendo *before the justice of assize*, the action does not lie; inasmuch as it does not appear, without the help of the *innuendo*, that the publisher intended a forswearing before the justice of assize.

But, if it be averred in the declaration in an action upon the case, that the defendant spoke these words to the plaintiff, *Thou, innuendo the plaintiff, art a thief*, the action lies; because it appears plainly, and without the help of the *innuendo*, that the plaintiff was the person intended by the speaker.

It has been holden, that an action lies for publishing these words of the plaintiff, *He was perjured in his answer in the Star-chamber*, innuendo, *in a certain bill exhibited there by the plaintiff*; although it be impossible, as such bill was never exhibited upon oath, that *J. S.* could be perjured in exhibiting it; and by the court—As the words are actionable, without the help of the *innuendo*, that is void, and ought not to be regarded. [For the office of an *innuendo*

4 Rep. 17.  
James v.  
Rutlech.  
Vide Cowp.  
684.

Cro. Car.  
443. Slo-  
comb's case.

4 Rep. 17.

4 Rep. 20.  
Barham's  
case. 1 Roll.  
Abr. 82.  
pl. 1.

1 Roll. Abr.  
82. pl. 1.

1 Roll. Abr.  
73. Burgess  
v. Reeves.  
4 Rep. 17.

Cro. Eliz.  
609.  
Corbett v.  
Hill. 1 Roll.  
Abr. 83.

Cowp. 684.

*innuendo* is to explain matter sufficiently expressed before; but the *innuendo* in this case is not an *explanation* of what was said before, but an *addition* to it.

Oldham v.  
Peeke 2 Bl.  
Rep. 959.

The plaintiff declared, that on a *colloquium* concerning the *death* of one *D. D.* the defendant said to the plaintiff, *You are a bad man, and I am thoroughly convinced that you are guilty* (meaning of the murder of the said *D. D.*). It was objected, that the *innuendo* of *murder* is overstrained, there being no *colloquium* laid of *murder*, but only of *death*. But by the court—The *innuendo* of *murder* is warranted, though the *colloquium* is laid to be of *death*. *Death* is the genus, and *murder* the species. When the conversation was of the death of *D.* and the defendant says the plaintiff is *guilty* of it, he must mean such a species of death as would infer guilt. Murder is such a species. It is not therefore contradictory, but explanatory; not introductory of new matter, but ascertaining the meaning of the old; and limiting the general word *death* to one particular species of it, *murder*.]

### 5. What may be pleaded in Justification of Words.

3 Ref. Abr.  
8-  
Cuddington  
v. Williams.

If an action be brought for calling the plaintiff *thief*, the defendant may plead in his justification, that the plaintiff has been guilty of a certain theft.

BRO. Action  
of the Case,  
104.

If the words, for the publication of which an action is brought, be, *J. S. is a perjured man*, the defendant may plead in his justification, that *J. S.* was perjured in a certain cause.

Vide *supra*  
vol. 4. 455;  
456.  
Rex v.  
Roberts,  
Mich.  
3 C. 2.

It is said to have been agreed by the court in an action for a libel, that where slanderous words are in writing, the truth of the charge thereby imported can no more be justified in an action upon the case, than in a criminal prosecution. But no other case is to be met with, wherein the doctrine of this case is adhered to.

Hob. 81.  
Cuddington  
v. Wilkins.

In an action for publishing these words of the plaintiff, *He is a thief*, the defendant pleaded, that the plaintiff had been guilty of stealing something. The plaintiff replied, that after the felony and before the publication of the words, he had been pardoned by a general pardon. Upon a demurrer, this replication was holden to be good; inasmuch as the guilt, as well as punishment, is taken away by the pardon. It was likewise holden, that it makes no difference in such case, whether it was a general pardon, or a special pardon, of which the defendant might have been ignorant; for that every person, who publishes slanderous words, does it at his peril.

Raym. 23.  
Harris's  
case.

If the plaintiff reply to a plea of justification, a general pardon, it is incumbent upon him to shew, that he is not within any of the exceptions therein contained.

Cro. Car. 52.  
Powell v.  
Plunkett.

In an action for publishing these words of the plaintiff, *He stole plate out of my chamber*, the defendant pleaded, that he had lost plate out of his chamber; and that, suspecting the plaintiff to have stolen it, he did publish the words. The plea was upon a demurrer

demurrer holden to be bad; and by the court—Suspicion is not a sufficient justification for the publication of slanderous words.

Common fame will justify the arresting of a person upon suspicion of having committed a felony, and the charging of him in a judicial way with having been guilty thereof: but common fame is not a justification for such charge in an extrajudicial way.

1 Roll. Abr.  
43. Bury  
v. Child.  
Hob. 82.  
Cro. Eliz.  
248. Hutt. 13.

The precise words, and all of them, for the publication of which the action is brought, must be confessed and justified by the defendant's plea, otherwise his justification is bad.

If an action be brought for publishing these words of the plaintiff, *He is a traitor*, it is not sufficient for the defendant to plead, that he only published these words, *Such things traitors do*.

4 Rep. 13,  
14.  
Cro. Eliz.  
153.  
Billingham  
v. Minors.  
1 Roll. Abr. 83.

If the plaintiff in an action upon the case declare, that whereas she was of good fame and reputation, the defendant published these words of her, *She is a common whore*, and the defendant plead, that at the time of publishing the words the plaintiff was not of good fame or reputation, the plea is bad; inasmuch as it is no answer to the words, and only goes to what is alleged by way of inducement, which required no answer.

Styles, 118.  
Strachy's  
case.

If it be averred in the declaration in an action upon the case, that the defendant published certain words of the plaintiff, it is not a good justification for the defendant to plead, that he heard another publish the words, *que est eadem*: for it can never be the same thing, to publish words and to hear them published.

2 Roll. Rep.  
284. Scarlet  
v. Jennings.

[But, if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former.]

Davis v.  
Lewis.  
7 Term Rep.  
17.

If it be averred, in the declaration in an action upon the case, that the defendant published these words of the plaintiff, *He is a thief and hath stolen 20 l.* and the defendant plead, that the plaintiff did steal two pullets, this is not a good justification; it being no answer to the words.

2 Roll. Rep.  
214. Mercer  
v. Hildsen.

In an action for speaking these words to the plaintiff, *Thou hast played the thief, for thou hast stolen my cloth and half a yard of velvet*, the defendant justified the speaking of these words, *Thou hast stolen part of the velvet delivered to you*. The justification was holden to be bad; because it only goes to part of the words.

Cro. Eliz.  
239. Johns  
v. Gittings.

If the words, for publishing of which an action is brought, charge a tradesman with having been a bankrupt upon the first day of *April 17 Ja.* and the defendant plead, that the plaintiff was a bankrupt upon the first day of *April 15 Ja.* and that therefore he published the words, the plea is bad: because it is not averred, that the plaintiff continued a bankrupt to the time of publishing the words; for he might afterwards recover his credit in trade.

Cro. Jac.  
578.  
Upcher v.  
Betts.

If any other words were published at the time, the words, which are contained in the plaintiff's declaration were published, or, if any circumstance attend the publication of those words, which

4 Rep. 13,  
14. 10.  
Cro. Car.  
510.

which would render them not actionable, the defendant may in his plea avail him thereof.

4 Rep. 13,  
14. Crom-  
well's case.

In an action for speaking these words to the plaintiff, *You are a murderer*, the defendant pleaded, that, in a conversation with the plaintiff concerning poaching, the plaintiff confessed he had killed a great number of hares; and that thereupon he said to him, *You are a murderer*, innendo *a murderer of hares*. The plea was holden to be good; and by the court—As this plea doth confess and justify the words, it would be unreasonable, to confine the defendant to the general issue.

The publication of slanderous words, for which an action would in the general lie, may in certain cases be justified, although the words are false.

Cro. Eliz.  
230. 248.  
Hob. 82.  
Hutt. 113.  
1 Roll. Abr. 43.

The publication of words, which import the charge of a crime, may notwithstanding the falsity of them be justified, if they have been only published in a course of justice.

Cro. Jac.  
90.  
1 Roll. Abr.  
87.  
Stiles, 462.  
Antz, 498.

A barrister may justify the speaking of slanderous words, in pleading his client's cause, although the words are false; it being his duty to speak for his client; and it being likewise in a course of justice.

Cro. El. z.  
230. Buck-  
ley v. Wood.

A witness may justify the speaking of slanderous words in giving his evidence which are false, this being in a course of justice.

MS. Rep.  
Abley v.  
Young.  
Trin.  
32 G. 2. in  
K. B.  
[2 Burr.  
307. S. C.]

A complaint having been made by the plaintiff against the defendant in the court of King's Bench, he exhibited an affidavit, wherein he charged the plaintiff with having sworn falsely against him. An action being thereupon brought, the defendant pleaded in his justification, that the words suggested to be libellous, were contained in an affidavit made in his defence, against the complaint in this court, and in answer to an affidavit made by the plaintiff. The question upon a demurrer to this plea was, whether it were a good plea? All the justices were clearly of opinion that it was; and by Lord Mansfield, Ch. J.—If the denying in one affidavit of what is sworn in another should be deemed a libel, actions for libels would be endless; for an action might be brought in every case, wherein there are contradictory affidavits. Witnesses must be at liberty to contradict each other; nor is there any necessity for an action in such case; for if slanderous words, which are immaterial, are contained in an affidavit, the court has power to do complete justice to the party injured, not only by ordering a satisfaction to be made, but likewise by ordering the slanderous words to be expunged.

Cro. Jac.  
91. Green-  
wood's case.  
1 Roll. Abr.  
87.

If a preacher, without an intent to slander, recite a slanderous story in his sermon, which is false, the doing of this may be justified.

Stra. 1200.  
Underwood  
v. Parks.  
[It was

Heretofore the truth of the charge imported by the words, for the publication of which an action was brought, was allowed to be given in evidence, in mitigation of damages, upon the plea of not guilty:

guilty: but at a meeting of all the judges it was agreed, not to allow this to be done for the time to come; because, unless the truth of the charge imported by the words is pleaded in justification, the plaintiff cannot come prepared to shew the falsity thereof.

holden prior to this case, that where the charge is of a particular and spe-

cified criminal act not capital, the defendant may give the truth of it in evidence. *Smithies v. Harrison*, per Holt, C. J. 1 Ld. Raym. 727. However, where the words charged impute a capital crime, if the plaintiff gives evidence of other expressions to the same purpose in aggravation, the defendant may, in mitigation, give evidence that these last are true, for he had no opportunity to plead it. *Collison v. Loder*, Oxon. 1750, per Burnet, J. Bull. N. P. 10.]

## (T) In what Kinds of slanderous Words Spiritual Courts have Jurisdiction.

**A**LTHOUGH an action upon the case, for the publication of words, does not lie, unless the words are in themselves actionable, or some special damage has been received from them, the party of whom they have been published is not in all other cases without redress; for, if words amount to a spiritual defamation, a suit may be instituted in a spiritual court.

No words amount to a spiritual defamation; unless they import a charge of an offence, which is consutable in a spiritual court.

2 Lev. 49. 2 Roll. Abr. 296. Sid. 393. Salk. 543. Stra. 946.

It follows, that if no suit can be instituted in a spiritual court, for the offence of which the words import a charge, none can be instituted for the words.

A suit may be instituted in a spiritual court for publishing these words of *J. S.* *He is an heretick*; heresy being punishable in such court.

It has been holden, that a suit may be instituted in a spiritual court for publishing these words of a clergyman, *He preacheth nothing but lies and malice*; because the question, whether a clergyman have discharged his duty properly, is fit to be tried in such court.

In a subsequent case, wherein a suit was instituted in a spiritual court for publishing these words of a clergyman, *He is an impudent ignorant blockhead; his spiritual advice is not fit to be followed; he is not fit to administer the sacrament*, it was said, in shewing cause against a rule to shew cause why a writ of prohibition should not be awarded, that these words reflected upon him in his profession, and the authority of the preceding case was relied upon. A prohibition was awarded; and by *Holt*, Ch. J.—Although these words do reflect upon a clergyman in his profession, they do not charge him with any thing which is punishable in a spiritual court.

A suit may be instituted in a spiritual court for publishing these words of *J. S.* *He is a pander*; for a pander may be punished in a spiritual court.

So it may for publishing these words of a woman, *She is a bawd*; because a bawd is punishable in a spiritual court.

linghead's case. 1b. 261.

So,

1 Freem.

300.

3 Lev. 18.

So, for publishing these words of *J. N.* *He is an adulterer*; for adultery is punishable in a spiritual court.

Salk. 692.

Smith v.

Wood. Cro.

Jac. 323. 3 Lev. 350.

So, for publishing these words of *J. S.* *He is a whoremaster*; fornication being punishable in a spiritual court.

Cro. Car.

111. Eaton

v. Ayloff,

Pasch. 4 Car.

Sid. 433.

It has been holden, that it is not a spiritual defamation to publish these words of a woman, *She is a whore*; for that, unless she be at the same time charged with some act of incontinency, the words are to be considered as words of heat.

Sid. 404.

Mellett v.

Herbert,

Hil.

20 Car. 2.

1 Ventr. 7.

But in the case of *Mellett v. Herbert*, which is said to have been determined upon considering all the cases, it is laid down, that a suit may be instituted in a spiritual court, for calling a woman *whore*.

2 Lev. 63.

Betniff v.

Poppie,

Tri. 1.

24 Car. 2.

1 Ventr. 220.

A few years after it was again holden, and upon great consideration, after two arguments at the bar, that the publication of these words of a woman, *She is a whore*, is a spiritual defamation; for that such words, which render a woman liable to suffer public penance, ought not to be considered as words of heat.

Salk. 696.

Graves v.

Blanchett.

3 Lev. 193.

Salk. 693.

The doctrine of the two last cases having been frequently recognised, it is now settled, that a suit may be instituted in a spiritual court, for calling a woman *whore*.

Carth. 498.

Pliff v.

Smith.

Stra. 471.

545. 555.

A suit may be instituted in a spiritual court for any words which are tantamount to the calling of a woman *whore*, as well as for calling her *whore*.

2 Lev. 66.

Tofer v.

Davis.

If these words are published of a married man, *He is a cuckold*, he cannot maintain a suit in a spiritual court, unless his wife join in it; because she only is defamed by the words.

Salk. 692.

Smith v.

Wood.

But, if these words have been published of a married man, *He is a wittal*, he may institute a suit in a spiritual court, without his wife joining in it; inasmuch as the words imply his having consented, or at least his having been privy, to the adultery of his wife.

2 Roll. Abr.

298. Motam

v. Motam.

10 Mod. 64.

A wife may institute a suit in a spiritual court, without her husband joining in it, for words which import the charge of her having been guilty of adultery; because she is liable to do penance for this offence.

3 Lev. 119.

Vincent v.

Alpy.

It has been holden, that *A.* say to *B.* the son of *C.* *You are a son of a whore*, the son or mother may either of them institute a suit in a spiritual court.

11 Mod.

113.

Hofkins v.

Lee.

But in another case it was holden, that only the mother can institute a suit in a spiritual court for words published of her son, which are tantamount to calling him *bastard*; because such words are not defamatory to the son.

## (U) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Words.

1. Where actionable Words are coupled with Words which are a spiritual Defamation.

IF words, for which an action would lie, are coupled with words, which are a spiritual defamation, and a suit is instituted in a spiritual court for the whole words, a prohibition lies. It would be vexatious to proceed both in a spiritual and in a temporal court; and the injured person, if he means to have satisfaction for the damage sustained, must proceed by an action in a temporal court, the proceedings in a spiritual court being only *pro salute anime*.

If a suit be instituted in a spiritual court for publishing these words of a woman, *She is a pockey whore*, a prohibition lies; for as these words import a charge of her having the *great pox*, as well as being a whore, an action would lie.

A prohibition lies to a suit in a spiritual court for publishing these words of a woman, *She is a whore and a thief*; because an action would lie for the word thief.

295. Ld. Raym. Sec.

So, for publishing these words of a woman, *She is a whore and keeps a bawdy-house*, because an action would lie for the latter words.

Although only words which are a spiritual defamation are contained in the libel exhibited in a spiritual court, if it be suggested to a temporal court, having power to award a prohibition, that other words for which an action would lie, were coupled with those contained in the libel, a prohibition lies.

2. Where a Temporal Damage has been received from Words, which are a spiritual Defamation.

If it be suggested to a temporal court, having power to award a prohibition, that a temporal damage has been received from words which are a spiritual defamation, a prohibition lies.

A servant to the abbot of St. *Albans* had, by the direction of his master, prevailed upon a married woman to come to his master's chamber. As soon as the abbot was alone with her, he began to find fault with the meanness of her dress. The woman answered, that her dress was as good as her husband could afford to buy for her. Upon this he told her, well knowing what women set their hearts upon, that if she would submit to his will, she should go as well dressed as any woman in the parish. As she would not comply with the proposal, he after assaulting her and making an attempt to lie with her by force, which did not succeed, locked her up in his chamber, hoping at another time to accomplish his design. The husband being informed of all which had passed, spoke publicly of the abbot's behaviour to his wife, and

4 Rep. 22.  
Palmer v.  
Thorpe.  
F.N.B. 55.  
Comb. 362.  
Carth. 213.

12 Mod. 243.  
Whitfield v.  
Powell.

Sid. 404.  
Mellet v.  
Herbert.  
2 Roll. Abr.  
Raym. Sec.

Salk. 512.  
Galizzi v.  
Rigault.

2 Roll. Abr.  
295. Butler  
v. Bartlett.

4 Rep. 20.  
Palmer v.  
Thorpe.

and threatened to bring an action for the false imprisonment. Hereupon the abbot, intending to add oppression to injury, instituted a suit against the husband, in a spiritual court, for saying he had solicited his wife's chastity. The whole matter being disclosed to a temporal court, having power to award a prohibition, a prohibition was awarded; the court being of opinion, that as the spiritual defamation was coupled with the assault upon and imprisonment of the wife, for which an action would lie, it was not proper that the suit in the spiritual court should proceed.

Sid. 214.  
Boys v.  
Boys.  
4 Rep. 17.  
1 Lev. 134.

A prohibition lies to a suit in a spiritual court, for publishing these words of a woman, who has a right to enjoy an estate she is in the possession of so long as she lives chaste, *She is a whore*; for, as she may, by reason thereof, be brought into danger of losing the estate, an action would lie.

1 Roll. Abr.  
36. Hassell  
v. Cooper.  
Comb. 133.

If a suit be instituted in a spiritual court for publishing these words of a woman, who lives in *London*, *She is a whore*, a prohibition lies; because, as, by a custom of that city, a whore is liable to be carted, an action would lie.

Lutw. 1039.  
Houblon v.  
Miller. Cro.  
Car. 339.  
Sid. 248.

It was formerly holden, that a prohibition did not lie to a suit in a spiritual court for publishing words of a woman, who lives in *London*, which import a charge of incontinence; for that only the word *whore* is within the custom.

Stra. 555.  
Cooke v.  
Wingfield.  
8 Mod. 115.

But it has been since holden, that the word *strumpet* is within the custom, and consequently that a prohibition lies to a suit in a spiritual court, for publishing these words of a woman, who lives in *London*, *She is a strumpet*.

Stra. 471.  
Vicars v.  
Worth.  
Ib. 545.

A prohibition lies to a suit in a spiritual court for calling the husband of a woman, who lives in *London*, *Cuckold*; for, as calling him *cuckold* is tantamount to calling her *whore*, the word is within the custom.

4 Rep. 17.

If a suit be instituted in a spiritual court for publishing these words of a clergyman, *He is an heretick*, if by reason thereof he lost a benefice, to which he was about to be presented, a prohibition lies, because an action would lie; the loss of the benefice being a temporal damage.

1 Roll. Abr.  
34. Davis  
v. Gardiner.  
4 Rep. 16.  
Cre. Jac.  
162.

A prohibition lies to a suit in a spiritual court for publishing these words of a woman, *She had a bastard by J. S.* if by reason thereof she lost a marriage with *J. N.* because an action would lie for the loss of the marriage.

1 Roll. Abr.  
35.  
Matthew  
v. Crofs.  
Cro. Jac.  
323. 422.  
Litch, 118.

So, to a suit in a spiritual court, for publishing these words of *J. S.* *He is a whoremaster*, if by reason thereof he lost a marriage with *A. D.*; for the loss of a marriage is as great a damage to a man as to a woman.

Cro. Car. 269.

4 Rep. 21.

If a suit have been carried on in a spiritual court for a spiritual defamation, and the defendant, after agreeing to commute the penance to which he has been sentenced, by paying a sum of money to the party defamed, refuse to pay the money, a prohibition does not lie to a suit in that court, for compelling him to pay it.



3. Where the Words, which are a spiritual Defamation, import a Charge of an Offence not conusable in a Spiritual Court.

As only words, which import the charge of an offence which is conusable in a spiritual court, are a spiritual defamation, a prohibition lies to a suit in a spiritual court for words which do not import such charge. The prohibition is in this case founded upon that general power, which the king's superior temporal courts have, to prohibit all other courts, spiritual as well as temporal, from proceeding in a cause, which is not within their jurisdiction.

If a suit be instituted in a spiritual court for publishing these words of a clergyman, *He is a fool, an ass, or a goose*, a prohibition lies; the words being words of heat. 2 Lev. 49.  
Newman v.  
Ringerby.

So, if a suit be instituted, for publishing these words of a clergyman, *He is a dunce and a blockhead; I wonder the bishop would ordain such a fellow; he deserves to have his gown pulled over his ears*; a prohibition lies; for a clergyman is no more punishable in such court, because he is a *dunce and a blockhead*, than another man. It being said, in this case, that a clergyman may be deprived of his benefice for want of learning, *Rolle*, Ch. J. answered, if that should be the case, he must bring an action at law, deprivation of a benefice being a temporal damage. Salk. 692.  
Coxiter v.  
Parsons.  
11 Mod.  
140. 208.

So, if a suit be instituted, for speaking these words to a clergyman, *You are an old rogue and a rascal, and a contemptible fellow, and hated and despised by every body*, a prohibition lies; the words not being a spiritual defamation. Stra. 946.  
Musgrave  
v. Bovey.

A prohibition lies to a suit in a spiritual court for publishing these words of *J. S.* *He is a knave*; because the being a knave does not make a person liable to any ecclesiastical censure. Salk. 548.  
Hawkins's  
case.  
2 Roll. Abr.  
206. Sid. 293.

These words, *He is as great a rogue as ever was hanged, and deserves hanging more than Doctor Pims*, were holden to be no spiritual defamation; and a prohibition was granted to a suit in a spiritual court for publishing them. 11 Mod.  
112.  
Hoskins v.  
Lee.

A prohibition lies to a suit in a spiritual court for calling a man *drunkard*; drunkenness not being punishable in a spiritual court. 2 Roll. Abr.  
296. Haynes  
v. Poynter.

If a suit be instituted in a spiritual court, for calling a woman *quean*, a prohibition lies; inasmuch as the meaning of the word *quean* is not well ascertained, and it is moreover a word of heat. 2 Roll. Abr.  
296.  
Blackshaw  
v. Stevens.

## Smuggling.

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**S**MUGGLING consists in the bringing on shore, or in the carrying from the shore, of goods, wares, or merchandize, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited.

This offence is productive of various mischiefs to society. The publick revenue is thereby lessened; the fair trader is injured; and the nation impoverished: rival, and perhaps hostile, states are thereby enriched; and the persons guilty thereof, being hardened by a course of disobedience to, and defiance of, law, become at last so abandoned and daring, as not to hesitate at being guilty of the greatest offences.

It must be the wish, and ought to be the endeavour, of every lover of his country, that many of the present high duties should be lowered. This would be very advantageous to trade; and it would, by removing in part the temptation, put some stop to the pernicious practice of smuggling, which all the severe laws made against it have not been found to do. In the mean time, it is not only their duty, but it highly concerns all persons of property, and every friend to peace and order, to co-operate in discountenancing this offence, and in carrying the laws made against it into execution.

Under this title, it will be proper to give some account,

(A) Of Customs in the general.

(B) Of the Origin of Customs.

(C) Of the ancient State of certain Customs.

1. Of the Duties upon Wool, Wool-fells, and Leather.
2. Of the Duty of Tonnage.
3. Of the Duty of Poundage.

(D) Of the present State of the Customs.

1. Of the Duty of Tonnage.
2. Of the Duty of Poundage.
3. Of the Duties to which Aliens are liable.

(E) Of prohibited Goods.

(F) Of

(F) Of the pecuniary Penalties and Forfeitures incurred by Persons guilty of Smuggling, or of such Practices as have a direct Tendency thereto.

1. In Ships at Sea or hovering upon the Coast.
2. In the Shipping or Unshipping of Goods at any Port, Member, or Wharf, not lawfully appointed for such Purposes.
3. In Ships in Port inward bound.
4. In Ships in Port outward bound.
5. In coasting Vessels.
6. In the Case of Certificate and prohibited Goods.
7. In divers other Cases.

(G) Of the corporal Punishments to which Persons who have been guilty of Smuggling, or of such Practices as have a direct Tendency thereto, are liable.

1. Imprisonment.
2. Whipping.
3. Transportation.
4. Death.

## (A) Of Customs in the general.

**A**S a part, and the most considerable part of the offence of smuggling consists in the bringing on shore, or in the carrying from the shore, of goods, wares, or merchandize, without paying the customs or duties, which ought to be paid upon the importation or exportation of such goods, wares, or merchandize, it cannot be improper, to give some account of the customs in general.

Under the word *customs*, is comprised every duty, which is to be paid upon the importation or exportation of goods, wares, or merchandize.

Duties upon the importation or exportation of goods, wares, or merchandize, were perhaps at first imposed, for enabling the crown to make and maintain commodious ports and harbours, and to keep up a fleet for the protection of the ships of merchants against enemies and pirates. As these services were of a permanent nature, it was reasonable that the duties appropriated for defraying the expence thereof should be so likewise; and it appears from the practice of early times, that this was the case.

The first (a) grant of a custom now extant was made to the king and his heirs; and in the (b) great charter, which was antecedent to this grant, mention is made of ancient customs, as being due and having been constantly paid. It may likewise be fairly inferred, from the fact of their having been paid for a number of years, without any new demand of the crown or grant from the

(a) Rot. pat.  
m. 3 E. 1.  
m. 1. n. 1.  
Rot. Fin.  
3 E. 1. m. 24.  
2 Inst. 59.  
(b) Mag.  
Ch. c. 30.

51 H. 3.  
ft. 5. f. 6.  
[(2) The  
customs are  
denominated  
in the bar-  
barous Latin  
of our an-  
cient re-  
cords. *custu-*  
*ma*; not *consuetudines*, which is the language of our law, whenever it means merely usages. This appellation seems to be derived from the French word *coustum*, or *coûtum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, charge, or, as we have adopted it in English, *cost*. 1 Bl. Comm. 324.]

people, that the imposition of ancient duties was for a continuance. From the length of time some ancient duties had been paid, in which they differed from such aids as were only paid during the continuance of a particular emergency, they did perhaps obtain the name of customary payments, or *customs* (a): by which name, all duties afterwards imposed upon goods imported or exported have been called.

## (B) Of the Origin of Customs.

IT has been a much altercated question, whether the right of imposing customs was heretofore in the crown alone, or whether it was always in parliament?

Dyer, 43. b.  
165. b.  
Dav. 9. a. b.

The maintainers of the former opinion distinguish between subsidies and customs. They admit, that the former were always assessed in parliament: but it is insisted, that the king alone had heretofore a right to impose customs, in consideration of the licence given by him, to export or import the commodities upon which they are imposed; of the interest he has in the sea, as being guardian thereof, and maintainer of its ports and harbours; and of the protection given by his ships to the ships of merchants against enemies and pirates.

The following authorities have been likewise relied upon, in support of this opinion:

Dyer, 92. a.  
Mich.  
3 Mar.

A patent for life having been granted by *Edw. VI.* to a merchant alien, for the importing and exporting of goods to a certain value, paying to the king his heirs and successors so much as an *English* merchant ought to pay, it was the opinion of all the justices in the Exchequer-chamber, that the patent continued to be valid after the king's death, for the old customs wherein he had an inheritance by his prerogative; and that it was only void as to the subsidy upon goods, which by a statute of tonnage and poundage had been granted to him for life only.

2 Inst. 62.  
Pasch.  
1 Eliz.

A judgment was given in the court of Exchequer, in an information against *German Ciol*, for a duty of forty shillings *per ton*, imposed by *Queen Mary* upon all wines of the growth of *France* brought into this realm.

2 Inst. 63.  
Mich.  
38, 39 Eliz.

The executors of *Smith* a customer were charged in an information for money received by their testator, on account of an imposition of three shillings and four pence, set by *Queen Elizabeth*, under her privy signet, upon every hundred weight of allum made in the pope's dominions; and judgment was given against them.

2 Inst 63.  
Pasch. 4 Jac.  
16 C. 1.  
c. 14.  
Hampden's  
case.

In an information against *John Bale*, for a duty imposed by the crown upon currants imported, judgment was given for the king.

Writs were issued commanding certain ports, towns, cities, and counties, respectively, to provide a certain number of ships for his Majesty's service, and suits were commenced against divers persons, who

who refused to pay the sums assessed upon them by way of contribution to this service. A *scire facias* being issued against *John Hampden*, Esq. to shew cause, why he should not be charged with certain sums assessed upon him, he demurred to the proceeding upon it. After divers solemn arguments in the Exchequer-chamber, it was agreed by the majority of the judges, that he ought to pay the sum assessed upon him; and there was judgment against him.

The principal reasons assigned for this judgment were; that, when the whole kingdom is in danger, the king may by writs under the great seal command all the subjects of his kingdom, to provide and fit out at their own expence such a number of ships, with men, victuals, and provisions, and for such time as he shall think necessary for the safety of the kingdom; that the king may by law, in case of refusal, compel the doing thereof; and that the king is the sole judge of the danger and of what is proper to be done to repel it.

It is very proper, that merchants should pay customs: but it by no means follows, that they should be imposed at the discretion or arbitrary will of the reigning prince; for, whatever seeming difference there may be, there is no real difference between discretion and arbitrary will.

The king may with as much propriety be called guardian of the land as of the sea; and if so, there is as much reason for his having a right to impose taxes at his pleasure for the defence of the one as of the other. A right to do this would, besides making a parliament in a great measure useless, make all private property insecure; for it would, in case there were such right, depend entirely upon the will of one man, how much of this every other man should be suffered to enjoy.

If the circumstances of the times, when the three former of these judgments were given, are considered, they will be found to have very little weight; and it is notorious, that no one thing contributed so much to the troubles which soon after arose, and at length ended in the death of the unfortunate prince then on the throne, as the decision in favour of ship-money did.

Instead, however, of merely defending the contrary opinion, and being contented with repelling the force of these authorities, it is better, in so constitutional a point, to act offensively, and endeavour to shew, by authorities of much greater weight, as well as more ancient, that, by the *English* constitution, the right of imposing customs was originally in parliament.

Before I attempt to do this, I shall take notice of a mistake as to this point of Lord Chief Justice *Coke's*, by which a very great man seems to have been misled.

After mentioning divers cases, in which it had been holden, "Vaugh. 161. that certain customs were due at the common law, and not originally imposed in parliament, *Vaughan*, Ch. J. adds, " This was " in those several reigns the opinion of all the judges of the times, " whence we may learn, how fallible even the opinion of all the " judges is, when the matter to be resolved must be cleared by

“searchers not common, and depends not upon things vulgarly known by readers of the year-books; for since these opinions it is known, that the customs, called the *antiquæ custumæ*, were granted to King *Edward* the First in the third year of his reign as a new thing, and were not due to the crown at common law.”

He goes on to cite a patent dated in the third year of *Edward* the First, which runs thus: *Cum prælati, et magnates, et tota communitas mercatorum regni nostri, nobis concefferint quandam novam consuetudinem de lanis, pellibus, et coriis, tam in Anglia quam in Hibernia et Wallia, regnum nostrum exeuntibus, in perpetuum nobis et hæredibus nostris capiendam, sicut in forma inde provisæ et communiter concessæ plenius continetur.*

From the date of this patent he observes, that the grant therein alluded to must have been by the statute of first *Westminster*, because no other statute had been made in the reign of this prince, before the date of the patent. In order to account for the grant's not being now a part of that statute, he supposes, that it was annexed to the roll of that statute by way of rider, and was afterwards casually lost from the roll. Having thus ascertained the time of the grant, he concludes, that the customs upon wool, wool-fells and leather, called from their great antiquity *antiquæ custumæ*, were not due at the common law, but were granted by the statute of first *Westminster*.

By comparing what is said by *Vaughan* with 2 *Inst.* 59. it will evidently appear, that the opinion of *Vaughan* was too hastily formed from *Coke's* comment upon the grant. It is scarce possible to be otherwise; for a man of *Vaughan's* sound judgment and acute discernment must, upon the least looking into the matter, have seen, that the customs upon wool, wool-fells, and leather, existed long before.

Magn. Ch.  
c. 30.

It appears plainly from the great charter, that some customs were due at the time this was made, and such as are therein called old customs.

51 H. 3. R. 5.  
§ 6.

By the statute *de Scaccario* the manner of accounting by the collectors of the customs upon wool is ascertained.

The words, *quandam novam consuetudinem, de lanis, pellibus, et coriis*, contained in the grant to *Edward* the First, imply strongly, that there was before a custom upon wool, wool-fells, and leather.

This false ground being removed, the next endeavour shall be, to shew the true ground, upon which the position contended for is built; namely, that the origin of customs was with the consent of parliament.

In order to discover the origin of customs, which are taxes of a particular kind, it will be proper to consider the origin of taxes in the general.

2 Inst. 533.

In that very ancient record *de modo tenendi parliamentum tempore Regis Edw. filii Ethelredi*, are these words, *debent auxilia peti in pleno parlamento*;

As the *Saxon* laws were by this prince, surnamed the Confessor, collected into a body, it is very probable that the method practised in his time, of granting aids in full parliament, was agreeable to those laws.

In the laws of the Confessor, which were afterwards confirmed by *William* the Conqueror, are these words, *Debet etiam rex omnia rite facere in regno, et per judicium procerum regni.*

Wilk. Leg.  
Anglo-Sax.  
200. Leg.  
Edw. 17.

If all things ought to be done by the king rightly in the kingdom, and with the advice of the great men of the realm, surely a thing of so much consequence as that of imposing taxes ought to be so done.

The fifty-second law of the Conqueror, by which the feudal law seems to have been introduced into *England*, the terms thereof being quite feudal, runs thus: *Statuimus ut omnes liberi homines fœdere et sacramento affirmant, quod infra et extra universum regnum Angliæ, quod olim vocabatur regnum Britannix, Willielmo regi suo domino fideles esse volunt, terras et honores illius fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*

Wilk. Leg.  
Anglo-Sax.  
228.  
Leg. Guil.  
Conq. 52.

The fifty-fifth law of the Conqueror runs thus: *Volumus etiam ac firmiter præcipimus et concedimus, ut omnes liberi homines totius monarchie regni nostri prædicti habeant et teneant terras suas et possessiones suas bene et in pace liberas ab omni exactione injusta, et ab omni TALLAGIO, ita quod nihil ab eis exigatur vel capiatur, nisi servitium suum liberum quod de jure nobis facere debent et facere tenentur, et prout statutum est eis, et illis a nobis datum et concessum jure hereditario in perpetuum per commune concilium totius regni nostri prædicti.*

Wilk. Leg.  
Anglo-Sax.  
228.  
Leg. Guil.  
Conq. 55.

As the words *per commune concilium totius regni* are not contained in the fifty-second law, it has been doubted, whether that law were made with the consent of the *commune concilium totius regni*? It is highly probable that it was, inasmuch as it appears, from the fifty-fifth law, that a law, introductive of the feudal law, had been made during the reign of the Conqueror with such consent; and there is no law extant, antecedent to the fifty-fifth, except the fifty-second, by which the feudal can be supposed to have been introduced. It is not material, whether the feudal law were introduced by the fifty-second law, or by some other law, made during the Conqueror's reign; for, if it were introduced by any law, to which the *commune concilium totius regni* did consent, that is sufficient to shew all that the present question requires to be shewn, namely, that it was not introduced without such consent.

If this be so, that the feudal law was not introduced without the consent of the *commune concilium totius regni*, it may be fairly inferred, that there was no right in the king alone of introducing it without such consent; for, if there had been such right, it would in all probability have been asserted by a prince, whose best title to the crown, whatever other title he might think proper to set up, appears to have been founded in conquest.

By the fifty-fifth law of the Conqueror it is declared, that all the freemen of the monarchy shall have and hold their lands and possessions free from all unjust exaction, and from every TALLAGE,

so that nothing shall be exacted or taken from them, except such free services as they of right owe and ought to do to the king.

Spelm.  
Gloss.

2 Inst. 531,  
532.

The word *tallage*, derived from the *French* word *tailler*, which signifies to cut off part of a thing, is a most comprehensive word; for it includes all subsidies, taxes, and impositions whatsoever.

Is it to be imagined that, unless the people had a right to be free from the imposition of any *tallage* by the king alone, such right should be granted them by a conqueror? A conqueror may, for the sake of making himself secure in a new conquest, think it prudent to confirm their ancient privileges to his conquered subjects; but it is scarce to be hoped, that he should grant them any new privilege.

Cust. de  
Norm. c. 35.  
Med. Hist.  
Exch. 427.

By the introduction of the feudal law, inferior lords, and the king as supreme lord, acquired a right to divers aids, which were incidental to feudal tenure. These were an aid for making the lord's eldest son a knight; another for the marriage of his eldest daughter; and a third for the ransom of his person when taken prisoner.

Med. Hist.  
Exch. 428.

Not content with these aids, inferior lords demanded an aid to enable them to pay their fines to the king, and another to enable them to pay their debts; nay, it became a question in the reign of *Henry* the Second, whether they might not demand an aid whenever they entered upon any military expedition?

Med. Hist.  
Exch. 419,  
420, 421.

While inferior lords thus oppressed their tenants under the pretence of demanding aids, the king in his turn required from them divers aids, to which they were not liable. This was at length carried so far, that the king did, upon the occasion of any war, assess what sums he pleased upon every knight's fee. Exactions of this kind gave great dissatisfaction, and became at length so grievous, that the people in the reign of *John* flew to arms; and being successful compelled him to sign a charter.

Matt. Paris,  
257.

By a clause in that charter the people were restored to the privilege of not being taxed without the consent of parliament, which they had enjoyed under their *Saxon* monarchs; and which, except as to the aids incidental to feudal tenure, had been recognized by the Conqueror.

The clause runs thus: *Nullum scutagium vel auxilium ponam in regno nostro, nisi per commune concilium regni nostri, nisi ad corpus nostrum redimendum, et ad primogenitum filium nostrum militem faciendum, et ad filiam primogenitam semel maritandam. Et ad hoc non fiet nisi rationabile auxilium—Et ad habendum commune concilium regni de auxilio assidendo, aliter quam in tribus casibus prædictis, summoneri faciemus archiepiscopos, &c.*

Westm.  
33.

By this clause even the aids incidental to feudal tenure were to be reasonable, and what was to be paid for two of these was afterwards ascertained by a statute. The third, for the ransom of the king's person, was in its nature so uncertain, that the value thereof could not easily be ascertained. The ascertaining, as far as it could be done, of the aids, to which the king had clearly a right as supreme lord, shews how contrary it is to the genius of the

English



*English* constitution, to have any thing of this kind depend upon the will of the reigning prince.

Under a pretence that the charter of *John* was extorted whilst he was under duress, no regard was paid to it by his son *Henry* the Third ; and the clause just mentioned was omitted in the great charter. During the reign of *Henry*, and during a great part of the reign of *Edward* the First his successor, the practice of assessing aids without the consent of parliament was revived : but it occasioned so much discontent, that, in the twenty-fifth year of his reign, *Edward* added some chapters to the great charter, which did effectually supply the place of the omitted clause.

By one statute, after reciting that divers people of the realm had before given to this prince some aids and tasks, towards his war and other businesses of their own good-will, it is declared, “ that such aids, tasks, or prises shall not be drawn into a custom, “ for any thing that hath been done heretofore.” 25 E. 1. c. 5.

It is probable that the recital in this statute was more calculated to throw a veil over some late transactions, than to represent the real truth of the case ; but however this was, it concludes against the right of the king alone to impose aids and tasks.

By another statute it is declared, “ that no kind of aid, task, “ or prise shall henceforth be taken for any business but with the “ common assent of the whole realm, and for the common profit “ thereof, saving the ancient aids and prises due and accustomed.” Conf. Chart. 25 E. 1. c. 6.

Not many years after this prince did, by his own authority, impose a tallage upon cities, towns, and boroughs. 2 Inf. 532.

In the next year this prince required of all freeholders, possessed of land to the value of twenty pounds a year, an aid for carrying on a war in *Flanders*, which they refused to pay, because it had not been assessed as was required by the 25 E. 1. c. 6. with the common assent of the whole realm.

The imposing of this tallage, and the demand of this aid occasioned great murmurings and discontents amongst the commons. To prevent the ill consequences of these murmurings and discontents, and to quiet the minds of the commons, the statute *de tallagio non concedendo* was made in the thirty-fourth year of his reign.

By this statute it is declared, that “ no tallage or aid shall be “ imposed or levied by us or by our heirs in our realm, without “ the good-will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land.” 34 Edw. 1. ft. 4. c. 1.

No words can be plainer or more absolute than the words of this statute are ; but it ought to be observed in particular, that the word *tallage* is therein contained, which besides being the most comprehensive word that could have been made use of, is one of the words contained in the fifty-fifth law of the Conqueror.

Upon the whole it appears almost beyond a doubt, that the various struggles of the people were not to amend the *English* constitution ; but to deliver themselves from the encroachments made at different times thereupon. They obtained no more from *John*, when he was in their power ; they obtained no more at any time since ;

since; they obtained no more at this time than not to be taxed without the consent of parliament. This they had a right to, for it was part of the constitution; and had by the Conqueror, when in the plenitude of his power, been allowed so to be.

If this be so, that no tax could constitutionally be imposed without the consent of parliament, it follows, that there never could have been in the king alone a right of imposing such taxes, as have obtained the name of customs.

Besides the general reasons, which hold for the people's having always had the privilege of not being taxed in any case without the consent of parliament, there are some particular ones for their having had it in this. As nothing was of more consequence to the people, and more especially as they were inhabitants of an island, than the encouraging of foreign trade, it highly concerned them to take care, that this should not be loaded with improper or excessive duties. If, moreover, as has been observed, it was the practice of the most early times, to impose customs for a continuance, it was more necessary that they should have been well considered in parliament, before they were imposed, than that other taxes which were to last but a short time should.

It was not only fit, for these and divers other reasons, that the people should at all times have had this privilege: but there is a circumstance, which strongly evinces that they in fact always had it; namely, that the right of imposing customs was given up by some princes, who asserted a right to that of imposing other taxes.

When *Henry* the Third granted the great charter, it is plain, from its being therein omitted, that he would not agree to the insertion of that clause contained in the charter granted by *John*, by which no aids, except those due by tenure, were to be imposed without the consent of parliament. It is, however, declared by the great charter (a), "that all merchants, if they were not  
 (a) Magn. Ch. c. 30. " openly prohibited before, shall have their safe and sure conduct  
 " to depart out of *England*, to come into *England*, to tarry in and  
 " go through *England*, as well by land or by water, to buy and  
 " sell without any manner of evil tolts, by the old and rightful  
 " customs."

It is pretty clear, that by evil tolts, as here opposed to old and rightful customs, are meant customs imposed without the consent of parliament: but, if any doubt remained as to the meaning of those words, it is removed by a subsequent statute.

25 Ed. 1.  
 st. 1. c. 7.

The words of this statute are, "And forasmuch as the greater  
 " part of the commonalty of the realm find themselves sore  
 " grieved with the evil toll of wool, that is to say, of forty pence  
 " for every sack of wool, and have made petition to us to release  
 " the same, we at their requests have clearly released it, and have  
 " granted that we shall not take such things without their com-  
 " mon assent and good-will, saving to us and our heirs the customs  
 " of wools, wool-fells, and leather, before granted by the com-  
 " monalty aforesaid."

In the printed statutes the words *quarante soudz*, contained in this statute, are translated forty shillings. This does not seem to be  
 a just

a just translation; for it is very improbable, that so large a duty should at that time have been imposed upon wool. The quantity of middling wool, equal to what was anciently called a sack, is not at this day worth above nine pounds; and if the difference, between the present value of money and the value of it at that time, be considered, it will be found, that a duty of forty shillings was equal, or nearly so, to the whole value of a sack of wool.

If from considering these two statutes it appear, that by evil tolts such customs as had been imposed without the consent of parliament were intended, it follows that *Henry the Third*, who would not give up the right of imposing other aids, has, by the great charter, admitted, that customs, which are imposed without such consent, are not rightful.

From a patent of *Edward the First*, dated in the third year of his reign, which has been already cited to another purpose, it is evident, that a grant of a custom upon wools, wool-fells, and leather, had been made by the *prelati et magnates, et tota communitas mercatorum*, to this prince and his heirs.

It was more than twenty years after the date of this patent, before this prince gave up, by the statute called *Confirmatio Chartarum*, the right of imposing aids; and in the mean time it is certain that he did in fact exercise it. Can any good reason be assigned, for his accepting a grant of a custom, which amounted to a confession that without such grant he could not have imposed it, so many years before he gave up the right of imposing aids, except his being persuaded, that he had not so good a right to impose customs, as he had to impose aids?

It must be submitted to the consideration of the reader, whether what has been said be sufficient to shew, that the origin of customs was the consent of parliament? but, however that may be, it is certain, that if the people had not before the privilege of being exempt from customs imposed without such consent, this privilege was fully granted to them by the two statutes of *Edward the First* (a), called *Confirmatio Chartarum*, and (b) *De Tallagio non concedendo*.

It is not necessary to the present question to shew, by how many subsequent statutes this privilege has been confirmed: but it will not be improper to mention what happened in the reign of *Edward the Third*.

A great part of the wool grown in *England* being, in the reign of this prince, manufactured into cloth, a question arose, whether a duty, in proportion to the quantity of wool used in making cloth, should be paid upon the exportation of woollen cloth? It was resolved, that, as the wool was by the labour of man changed into another sort of merchandize, no custom ought to be paid; and therewith the king, as appeareth by the record, in the Exchequer, held himself satisfied.

It appears, that by a statute not in print, made in the twenty-first year of this prince's reign, a duty was granted him upon woollen cloth exported; and the reason of granting it is said to be—*quia jam magna pars lane regni nostri in eodem regno pannificitur*,

(a) 25 Ed. 1.  
c. 6.  
(b) 34 Ed. 1.  
ft. 4. c. 1.

4 Inst. 29.

Orig. de  
Statut.

24 E. 3.  
Rot. 13.  
27 E. 3.

Rot. 4. *de qua custuma aliqua non est soluta, per quod proficuum quod de custumis*  
 4 Inst. 30. *et subsidis lanarum, si extra regnum ducerentur, percipere debemus,*  
*multum diminuitur, &c.*

4 Inst. 30. The following remark of Lord Chief Justice *Coke* upon these transactions is very proper: "If in any case the king might by his prerogative have set an imposition, he might have set one in this; for, as it appeareth from the record, by making of cloth the king lost his custom of wool."

## (C) Of the ancient State of certain Customs.

### 1. Of the Duties upon Wool, Wool-fells, and Leather.

4 Inst. 29. **I**T does not appear from any record now extant at what time  
 Dyer, 165. they were first imposed; but it seems clear, that the duties upon wool, wool-fells, and leather, are the most ancient of all the customs; for no mention is made in the records of the most early times of any other.

51 H. 3. The statute *de Scaccario*, in directing how collectors of the  
 ft. 5. § 6. customs shall account, does indeed say they shall account for every charge in a ship whereof custom is due; but nothing is therein particularly mentioned except wool.

Rot. Pat. From a patent of *Edward* the First it appears, that a grant was  
 3 E. 1. m. 1. made in the third year of his reign to him and his heirs of the  
 n. 1. Rot. following custom: *de sacco lane dimid. marc., de 300 pellibus dimid.*  
 Fin. 3 E. 1. *marc. et de lasto corii xiii. s. iiii. d.*  
 m. 24.  
 2 Inst. 59.

Chart. Mer- Some years after the merchant strangers, in consideration of  
 catoria Rot. some privileges and immunities obtained from this prince, did, by  
 Chart. a charter, grant to him and his heirs, *de quolibet sacco lane 40d. de*  
 31 E. 1. *incremento ultra custumam antiquam dimid. marc. que prius fuerit*  
 n. 44. *persoluta, et sic pro lasto coriorum dimid. marc. et de trecentis pellibus*  
 2 Inst. 59. *lanatis 40d. ultra certum illud, quod et antiqua custuma fuerit, prius datum.*

As this charter speaks only of these commodities being, at the time it was granted, liable to the custom granted to this prince in the third year of his reign, it may very well be concluded, that all the old customs upon them ceased from the time of that grant.

From this time the distinction, met with in the books of *Antiqua Custuma* and *Nova Custuma*, seems to have been first made, that granted before to this prince being called, probably because it was given in lieu of the ancient custom upon those commodities, *Antiqua Custuma*, and this now granted by the merchant strangers being called *Nova Custuma*.

In the time of *Edward* the Third the woollen manufactures were so established in *England*, that great part of the wool grown in the kingdom was made into cloth. In order to make amends to the crown, for the loss of the custom upon wool hereby sustained, a duty was granted upon woollen cloth exported,

Orig. De  
 Scaccar.  
 24 Ed. 3.  
 Rot. 13.  
 27 Ed. 3.  
 Rot. 4.  
 4 Inst. 30.

The duties upon wool and wool-fells imported, after having been often varied, are now at an end; the exportation of both being prohibited by divers statutes.

3 E. 4. c. 1.  
4 E. 4. c. 1.  
14 E. 4. c. 3.  
13 & 14 C. 2.  
c. 18. 7 & 8 W. 3. c. 28. 9 & 10 W. 3. c. 40.

The exportation of leather was once prohibited. Liberty has been since given to export it; but, instead of reviving the old duty, it was made subject to the general duty of poundage.

1 Eliz. c. 10.  
12 C. 2. c. 4.  
§ 10.

The duty upon woollen cloth exported, after having undergone various changes, was, in the reign of William the Third, entirely taken off, and with this all these ancient duties ended.

11 & 12  
W. 3. c. 20.

## 2. Of the Duty of Tonnage.

The duty upon wine imported is very ancient; it having been, as long ago as the reign of Henry the Third, accounted for by the king's butler under the name of prisage.

2 Inst. 59.  
Rot. Pat.  
40 H. 3.

[Prisage of wines, says my Lord Hale, seems to be an ancient duty taken by the crown in all times. It is no part of that prerogative, which is called purveyance, to take provisions for the king's household; but it is a fixed settled inheritance, though possibly in its original it might have taken its rise from thence. And therefore it was agreed, 40, 41 Eliz. in a *quo warranto* against Haughton, who had the prisage of London and the ports adjacent, and the office of butler there, for years by the king's grant, that it was grantable for years or otherwise. In Ireland, it hath been received to the use of the crown by the family of the Butlers, now Earls of Ormond, being the king's chief butlers of Ireland by tenure. See Hale's tract concerning the Customs, 116.]

The practice anciently was to take for this duty two tons of wine, from every ship having twenty tons or more on board, one before the mast, the other behind it, paying twenty shillings for each ton.

Flet. lib. 2.  
c. 22. Rot.  
Parl. 28 E. 1.  
Rot. Pat.  
40 H. 3. 2 Bullstr. 254. Davis, 8. b. 4 Inst. 30.

This duty, because the wine was taken for the king's use, obtained the name and still retains the name of prisage.

By the *charta mercatoria* the merchant strangers granted a duty of two shillings per ton, to the king and his heirs, upon wines imported by them: but they were to be exempt from the duty of prisage, to which the English merchants still continued liable.

Chart. Merc.  
31 E. 1.  
n. 44.  
2 Bullstr.  
254.  
2 Inst. 30.

This duty, from its being received by the king's butler, obtained the name of butlerage, and has been since called by that name.

4 Inst. 30.  
6 G. 1.  
c. 12. § 8.

[All the books that speak of *butlerage* mention it as a favour to the foreign merchant, that instead of a pre-emption of wine in specie, there was this duty of 2 s. laid upon each ton; and no doubt, when the duty was first laid on, it was put upon this colour, that it was instead of the prisage, and as if better for the merchant. And indeed thus far it was better for the merchant, that it compounded with him for the king's setting the price upon the two tons, which very often created grievous exactions; for now the tribute of *butlerage* being laid per ton, the merchant knew upon what terms he imported wine into England. But the policy of Edward the First was much deeper; for by this he hindered all frauds in the importing of wine; for, if the vessel had held above twenty tons, the king had no more than two tons by way of pre-emption; and therefore enlarging the vessel was in fraud of the king. Besides that by this means, the king always received money from the merchant, whereas before the merchant used to receive money from the king, and to agree with the king for the pre-emption before he would break bulk; and now the prisage lying only on the king's subjects; when they had imported wine, it was necessary for them to come to the king's terms of pre-emption, and that money being paid to the subject was not carried out of the realm: so that by this policy of Edw. 1. all the money was kept within the realm: for on the wine imported by foreign merchants, they paid the *butlerage* in money to the crown; and for the wine imported by the subject, on which *prisage* was due, the money which the crown paid for pre-emption was paid to the subject. Gilb. Hist. Excheq. 211, 212.]

4 Inst. 32. In the sixth year of the reign of *Richard* the Second, a duty of  
 Dav. 11. 2. two shillings *per* ton upon all wine imported was granted to him ;  
 but it was only to continue for two years.

This duty obtained the name of *tonnage* ; and all duties since imposed upon wines have been so called.

2 Inst. 32. It appears from divers records, that the duty of *tonnage* was afterwards sometimes one shilling and six-pence *per* ton ; sometimes two shillings ; and sometimes three shillings ; and that it was not granted for life, but upon a particular occasion, or for one or more years ; and that conditions, as to the application thereof, were frequently annexed to the grants.

Rot. Parl. In the third year of *Henry* the Fifth, a duty of three shillings  
 3 H. 5. *per* ton was granted during his life.  
 n. 50.

31 H. 6. After the death of this prince, the custom of granting the duty  
 c. 8. of *tonnage* for a few years only was revived, it not being granted to his successor *Henry* the Sixth for life, until the thirty-first year of his reign.

Rot. Parl. It was afterwards granted to *Edward* the Fourth, *Henry* the Se-  
 4 E. 4. venth, *Henry* the Eighth, *Mary*, *Elizabeth*, and *James* the First,  
 12 E. 4. c. 3. for their respective lives ; and to all of them, except *Edward* the  
 Rot. Parl. Fourth, in the first years of their respective reigns.  
 1 H. 7.

Rot. Parl. 1 H. 8. 6 H. 8. c. 14. 1 E. 6. c. 13. 1 Mar. c. 18. 1 Eliz. c. 19. 1 Jac. c. 33.

16 C. 1. c. 8. The duty of *tonnage* was not granted to *Charles* the First until  
 12. 22. 25. the sixteenth year of his reign ; and it was then only granted from  
 29. 31. 36. time to time, and for very short spaces of time.

### 3. Of the Duty of Poundage.

The duty of *poundage* is so called, from its being paid at the rate of a certain sum in the pound.

Rot. Chart. The first instance upon record of this duty is a grant of three  
 31 E. 1. pence in the pound, made to *Edward* the First, upon the goods  
 n. 44. imported by merchant strangers.  
 27 E. 3.  
 ft. 2. c. 26. 2 Inst. 59.

4 Inst. 32. In the forty-seventh year of the reign of *Edward* the Third, a  
 Rot. Parl. duty of six-pence in the pound was imposed upon all goods ex-  
 47 E. 3. ported and imported, except wools, wool-fells, leather, and wines ;  
 n. 14. and *English* merchants, as well as merchant strangers, were made  
 Dav. 10. b. liable thereto.

Rot. Parl. In the fourteenth year of the reign of *Richard* the Second, this  
 14 R. 2. duty was raised to one shilling in the pound ; but it was three  
 n. 12. years afterwards reduced to six-pence.  
 17 R. 2.  
 n. 14.

Rot. Parl. It was raised to eight pence in the pound, in the second year of  
 2 H. 4. n. 9. the reign of *Henry* the Fourth ; and in the fourth year of the same  
 4 H. 4. n. 28. prince's reign to one shilling.

4 Inst. 32. From this time, to the ninth year of the reign of *William* the  
 12 C. 2. c. 4. Third, it continued at one shilling in the pound.

Since

Since the sixth year of the reign of *Richard* the Second, this duty, except in a very few instances, has been comprised in the same grant, with that of tonnage; and has been granted upon a particular occasion, for one or more years, or for life; and conditions, as to the application thereof, have been frequently annexed.

Heretofore credit was given to a merchant's papers for the value of the goods subject to this duty; nor was he obliged to swear to this, unless he neglected to produce a bill of lading.

Many frauds being discovered, a power was given to the officers of the customs to open and examine goods, in order to come at the true value: but no oath was enjoined.

The practice of our ancestors, in not enjoining an oath as to the value of the goods, seems worthy of imitation. Many considerate persons have been of opinion, that the introducing of so many Custom-house oaths has not been of use, even to prevent frauds in the revenue; for that, although a few persons may be conscientious, and swear truly, more is lost by relying upon oaths, and of course not examining so strictly, than is thereby saved. If this be so, it appears to be high time, that many, if not all, custom oaths should be laid aside; for nothing has so much contributed, as these oaths have, to take off that reverential awe which ought to be had for an oath, and consequently to open the sluices of perjury, which have so deluged the land.

The method of ascertaining the value of the goods subject to this duty by a book of rates, was practised in the reign of *James* the First, and in some of the preceding reigns.

[For the history of the customs before, and during the time of *Edward* the First, the reader is referred to the fifth and sixth chapters of my Lord *Hale's* Treatise upon the Customs, and to the eighteenth chapter of Mr. *Madox's* History of the Exchequer.]

## (D) Of the present State of the Customs.

UNDER this head no more is intended, than to give a general account of the present state of the customs: to give a particular account of the various duties imposed by divers statutes on the different kinds of goods, would be tedious, unenterprising and foreign to the design of this work. It would too be unnecessary; for this has been already done with great care and accuracy by Mr. *Crouch* and Mr. *Saxby*; in whose books professedly written upon the subject, such persons, as desire to have a complete knowledge of this part of the public revenue, will meet with satisfaction.

Much the greater part of the duties at this day payable are comprised under the denominations of tonnage and poundage.

Soon after the Restoration, the practice of granting a subsidy of these duties to the king for life was revived; and has been ever since continued.

9 W. 3.

c. 23.

1 G. 2. ft. 1.

c. 1.

[Upon the  
accession of  
his present

Majesty, a fixed revenue was granted to the crown, and this subsidy was carried to the aggregate fund. 1 G. 3. c. 1. That fund now forms a part of the consolidated fund created by 27 G. 3. c. 13. to which the several duties of the customs, excise, &c. thereby granted or consolidated are directed to be carried.]

In process of time divers other subsidies of tonnage and poundage were granted. But of all that are now paid, only that called the further subsidy, which was first granted in the reign of *William the Third*, is granted to his present Majesty for life, the rest being appropriated to divers uses.

By the 6 *Anne*, c. 26. § 17. it is enacted, "That all and every act of parliament made in *England*, and in force there, touching and concerning any custom or subsidies there, which are not contrary to or inconsistent with the articles of the Union of the two kingdoms of *England* or *Scotland*, or any of them, shall extend to *Scotland*."

### 1. Of the Duty of Tonnage.

The ancient duty of prisage upon wine imported does still continue.

Hard. 477.

It has been frequently holden in the court of Exchequer, for the sake of preventing frauds in this duty that, single prisage shall be paid for nine tons and a half of wine, and double prisage for nineteen tons, although *stricti juris* no duty was to be paid for less than ten tons. If only nine tons have been imported, prisage has been seldom allowed, without a proof of fraud; and if the quantity imported has been less than nine tons, it has never been paid.

Hard. 301.

By a charter granted to the city of *London*, in the first year of the reign of *Edward the Third*, the citizens are exempted from the duty of prisage. The words of it are, *et quod de vinis ipsorum civium nulla prisage fiat per aliquem ministrum nostrum, vel heredum nostrorum, seu ulterius contra eorum voluntatem; viz. de uno dolo ante malum et alio dolo retro, nec aliquo alio modo, sed inde perpetuo sint quieti.*

Hard. 310,

311. Waller

v. Travers.

The construction of this charter has been, that the exemption extends only to such citizens as are inhabitants of the city, and only to such wines as are imported in the port of *London*; except a ship be by stress of weather driven into any other port.

Heretofore the duty of tonnage was the same upon all wines imported: but in some modern statutes this is different upon wines of different kinds; and there is in the general a much larger duty paid in the port of *London*, than in the out-ports.

The different subsidies of tonnage are, from the time or manner of their having been imposed, thus distinguished:

That imposed by the 12 C. 2. c. 4. is called the old subsidy.

That imposed by the 9 & 10 W. 3. c. 23. is called the further subsidy.

That imposed by the 2 *Anne*, c. 9. is called the one-third subsidy.

That imposed by the 3 *Anne*, c. 5. is called the two-thirds subsidy.

That



That imposed by the 18 G. 2. c. 9. is called the subsidy of one thousand seven hundred and forty-four.

All these subsidies were at first imposed for a time; but the several acts by which they were imposed have been from time to time continued, and are all now in force.

Besides these subsidies, to which all wines imported are liable, there are duties imposed upon divers kinds of wines by particular acts of parliament.

Before the Restoration only wines were liable to a duty of tonnage; but since that time divers other liquors are, by particular acts of parliament, rendered liable to a duty of tonnage.

By 12 C. 2. c. 4. § 15. it is provided, "That the prisage of wines, or prise wines, shall not be charged with the payment of any custom, subsidy, or sum of money, imposed upon wines by this act."

Prisage wines exempted from duty.

By 1 Jac. 2. c. 3. § 6. it is enacted, "That no merchant shall be charged with any duty imposed by this act for the prisage wine which he imports; but that it shall be received, and taken from the person who hath or enjoyeth the benefit of the said prisage wine."

Prisage wines made liable to duty.

As the 9 & 10 W. 3. c. 23. by which a subsidy of tonnage is imposed upon wines imported, is quite silent as to prisage wine, the construction has been, that prisage wine is chargeable with the duty of tonnage imposed by this statute.

In an action of *assumpsit* for 500 pounds received to the plaintiff's use, it was found by a special verdict, that the defendant claimed the prisage of all wine imported under a grant from Charles the First; and that, by virtue of the grant, he was to hold the said prisage wine discharged of all aids and taxes; and the question was, whether the grantee should pay the subsidy of tonnage imposed upon wine imported by the 9 & 10 W. 3. for prisage wine? After judgment for the grantee in the court of Exchequer, a writ of error was brought in the Exchequer-chamber. It was insisted for the grantee, that prisage wine was a part of the ancient royal revenue; that if it were now in the hands of the queen, she could not pay a duty for her own prisage wine; and that the grantee, who claims under the crown, ought to have the same exemption; and the rather, because the prisage of all wine imported was granted to him, with an immunity from aids and taxes. It was on the other side admitted, that, if the wine had remained in the hands of the queen, no duty ought to have been charged upon it; it being absurd, that the queen should be chargeable with a duty to herself for her own wine: but it was said, that, as the wine comes into the hands of a subject, who may pay a duty for it, there is no absurdity in his being charged with the duty. It was likewise said, that the clause of immunity could only extend to the duty of tonnage, then subsisting, and not to any duty, which might be granted by a future act. It was holden by all the judges, that, immediately upon importation, the subsidy of tonnage, imposed by the 9 & 10 W. 3. c. 23. attaches upon all

Salk. 617.  
Paul v. Shaw.  
[Parker, 209. S. C. cited by the Chief Baron, and Lord Trevor's argument in part stated. The question determined by this case appears to have been a long time in agitation. In a manuscript book in the office of the Committee of Trade, which was obligingly communicated to the editor by Mr. George Chalmers, the author of several valuable political tracts, he has met

with the following case:—  
 “ Upon an action of assumpsit brought, term Pasch. anno 13 W. 3. by Wm. Paul, Esq. lessee of the prize wines, against Thomas Cocks, Esq. collector of the duty upon wines in the port of London, for 50 *l.*, the question upon the special verdict was this, viz. Whether prize wines were liable to pay the second subsidy, or the duty laid by the act of 9 & 10 W. 3. ?—Note. It was admitted by the special verdict, that the wines in question had paid the import laid by the act of 1 Ja. 2. c. 7. and also the additional import by the act of 4 & 5 W. & M. c. 5. and also 25 *l.* per ton, by the act of 7 & 8 W. 3. c. 20.—The case depended in the court of Exchequer about three years, and had been argued thrice by counsel on both sides, and this day being 16th June 1705, it stood for the judgment of the court; but the barons being divided in their opinions, viz. Mr. Baron Smith and Mr. Baron Talbot for the defendant, and Mr. Baron Bury and the Lord Chief Baron for the plaintiff, no judgment could be entered; and therefore upon the plaintiff's motion the cause was adjourned into the Exchequer-chamber *propter difficultatem*, to be heard before the twelve judges.

Abstract of the argument of the two barons who were of opinion for the defendant.

When the duty of prize was in the crown, no subsidy could be paid, because the crown could not pay duty to itself; but when it was granted out of the crown, then the contradiction ceases. It is the same case with that of a rector, who denies or lets out his glebe, and is entitled to receive tithes from his own lessee. The words in Sir Wm. Waller's patent, that they shall be free from all duties and sums of money whatever, could not extend to exempt prize wines from duties subsequent to the patent, but only from such as were then in being, and in the power of the crown. The statute of 1 Ja. 2. expressly provides, that the duty laid by the act should be paid by the person that was entitled to the prize; and the act of 9 & 10 W. 3. § 7. appointing that all the clauses, powers, directions, &c. in any former acts, shall be practised and put in execution for levying the duty as fully as if those acts had been recited, prize wines are as plainly subjected to that duty, as if the said clause in the 1st of James had been recited in the act of 9 & 10 W. 3. The case differs from wreck, prize wines being imported, which wreck is not, and then they are imported by way of merchandize, for all wines in the ship are originally imported by way of merchandize till the election of the prize wines is made; and even then, it is not to be imagined, that the patentee had it for his own consumption, whatever the crown had before the grant. Although the clause in the 12 Car. 2. § 16. to exempt prize wines from the tonnage be declaratory, yet the words are to be governed by the subject-matter of the act; and to what purpose was the declaring clause, if prize wines were not chargeable with the duty by the former part of that act?

Abstract of the argument of the two barons who were of opinion for the plaintiff.

Prize wines was a right originally vested in the crown by the common law, and so differs from other duties which were granted by parliament; *inherit ex officio*, and therefore stood exempt from all duties. The customs called *magna et parva custumia* were not due of common right or by prescription, the one being granted the 12 Edw. 1. the other *lege mercatorum*, in 31 Edw. 1., and by common law no imposition could be laid upon goods; and so in the statute of 12 Car. 2. of tonnage and poundage, § 7. Tonnage was first granted 5 R. 2. and afterwards successively the kings received it from the parliament, generally for lives. Prize was an inheritance, and King James the first had it as such: but he had but an estate for life in the tonnage: the first was his own estate, the other was a gift; so one could not operate on the other. Prize is very different from purveyance, which is only a power or privilege, but the other is a property, and may be granted. It was originally not chargeable with any duty, and carried along with it an exemption in its own nature. It was not originally imported for sale, or by way of merchandize. At the making of the statute of 12 Car. 2. of tonnage and poundage, and the clause relating to prize, *ut res, ita tempora rerum* are to be considered; and that clause first declares the original right of exemption, and then gives the exemption or particular discharge in virtue of that act. The duty laid by 9 & 10 W. 3. is called a further subsidy, and has such a relation to the act of tonnage and poundage, which is the standard, that the whole act seems incorporated into it; consequently, the same exemption takes place.”]

Newerry, 77. t. v. Colegate.  
 The editor has taken this case from the above book, communicated to him by Mr. Chalmers. The date of it is not mentioned:

[The ship *Eagle* was a vessel that carried timber from *Faversham* in the port of *Sandwich* to the port of *London*. She had no midship beam, nor any deck, and was an open vessel. All this was found by verdict on an information of seizure for the duty of tonnage, and the court was of opinion, that she was not chargeable with the duty of tonnage within the *stat. 5 & 6 W. & M.* for that statute prescribes no other rule to measure any ship by, but from the midship beam, and from the deck. Now no other duty is created by that act, but according to the measure; so not being measurable according to the act, she cannot be charged by the act.

The

The court also doubted, whether the vessel could be said to trade coastwise, as she was an open vessel, and never was at sea, nor could live at sea.] it appears, however, to have been before the year 1695;

## 2. Of the Duty of Poundage.

The different subsidies of poundage are, from the time or manner of their having been imposed, thus distinguished :

That imposed by the 12 C. 2. c. 4. is called the old subsidy.

That imposed by the 9 & 10 W. 3. c. 23. is called the further subsidy.

That imposed by the 2 Anne, c. 9. is called the one-third subsidy.

That imposed by the 3 Anne, c. 5. is called the two-thirds subsidy.

That imposed by the 21 G. 2. c. 1. is called the subsidy of one thousand seven hundred and forty-seven.

By the 12 C. 2. c. 4 § 1. it is enacted, “ That a subsidy called poundage, that is to say, of all manner of goods and merchandizes of every merchant, natural-born subject, denizen, and alien, to be carried out of this realm or any your Majesty’s dominions to the same belonging, or to be brought into the same by way of merchandize, of the value of every twenty shillings of the same goods and merchandizes, according to the several and particular rates and values of the same goods and merchandizes, as the same are particularly and respectively rated and valued in a book of rates hereinafter mentioned and referred unto, twelve pence, and so after that rate, except and foreprized out of this grant of subsidy of poundage all manner of woollen cloths, made or wrought or to be made or wrought within this realm of England, commonly called old draperies, and all wines before limited to pay subsidies of tonnage, and all manner of fish *English* taken and brought by *English* bottoms into this realm, and all manner of fresh fish and bestial that shall come into this your realm, and all other goods and merchandizes, which in the said book of rates are mentioned to be custom free.”

By § 6. it is enacted, “ That the rates, intended by this act, shall be the rates mentioned and expressed in one book of rates, intituled *the rates of merchandize, as they are rated and agreed on by the Commons House of Parliament, set down and expressed in this book, to be paid according to the tenor of the act of tonnage and poundage, and subscribed with the hand of Sir Harbottle Grimstone, Bart. Speaker of the House of Commons*, which said book of rates composed and agreed upon by your Majesty’s said Commons, and also every article, rule, and clause therein contained, shall be and remain as effectual, to all intents and purposes, as if the same were included particularly in the body of this present act.”

In the book of rates it is provided, “ That if there should happen to be brought in or carried out of this realm any goods liable to the payment of customs or subsidies, which either are

“ omitted in this book, or are not now used to be brought in or carried out, or by reason of the great diversity of the value of some goods could not be rated; that in such case ever customer or collector for the time being shall levy the said custom and subsidy of poundage according to the value or price of such goods, to be affirmed upon the oath of the merchant, in the presence of the customer, collector, comptroller, and surveyor, or any two of them.”

By the 9 & 10 *W. 3. c. 23. § 4.* it is enacted, “ That one further subsidy called poundage, that is to say, of all manner of goods and merchandizes, of every merchant, natural-born subject, denizen, and alien, to be imported or brought into this realm, or any one of his Majesty’s dominions to the same belonging, by way of merchandize, of the value of every twenty shillings of the same goods and merchandizes, according to the several and particular rates and values of the same goods and merchandizes, as the same are particularly and respectively rated and valued in the book of rates referred to by the 12 *Car. 2. c. 4.* twelve pence, and so after that rate; and if there shall happen to be brought into this realm any goods liable to the payment of the subsidy by this act granted, which are not particularly rated in the said book of rates, every customer or collector for the time being shall levy the subsidy by this act granted, according to the value or price of such goods, to be affirmed upon the oath of the merchant, in the presence of the customer, collector, comptroller, and surveyor, or any two of them.”

By this statute, besides all the goods excepted in the 12 *C. 2. c. 4.* all goods and merchandizes used in dying are excepted; and by § 5. it is enacted, “ That all drugs chargeable by this act, which shall be imported directly from the place of their growth in *English*-built shipping, and all spicery except pepper, which shall be imported directly from the place of its growth in *English*-built shipping, shall be rated to pay by this act one-third part of what is charged in the said book of rates and no more; and that this act shall not extend, to charge linen or wrought silks imported with the additional duty of one moiety of the rate mentioned in the said book of rates; or to charge tobacco, of the *English* plantations, with the additional duty of one penny *per* pound, over and above the subsidy mentioned in the said book of rates.”

By the 2 *Anne, c. 9. § 1.* it is enacted, “ That one other subsidy, called poundage, of all manner of goods and merchandizes to be imported or brought into this realm, or any of her Majesty’s dominions to the same belonging, by way of merchandize; that is to say, one-third part of such or the like several and respective duties, as, by an act of the ninth year of the reign of *William* the Third, are imposed or payable for or upon the same goods and merchandizes respectively, except the said goods and other merchandizes, as by the said act are exempted from the payment of the subsidy thereby granted.”

By the 3d of *Anne*, c. 5. § 1. it is enacted, “ That one other  
 “ subsidy, called poundage, of all manner of goods and merchan-  
 “ dizes to be imported or brought into this realm, or any of her  
 “ Majesty’s dominions to the same belonging, by way of merchan-  
 “ dize; that is to say, two-third parts of such or the like several  
 “ and respective duties, as by an act of the ninth year of the  
 “ reign of *William* the Third were granted, and are payable for  
 “ and upon the same goods and merchandizes respectively, ex-  
 “ cept tobacco and such currants as shall be imported in *English*-  
 “ built shipping navigated according to the laws now in force,  
 “ and sugar from the *English* plantations; and such goods and  
 “ other merchandizes, as by the said act are exempted from the  
 “ payment of the subsidy thereby granted.”

No goods, wares, or merchandize exported were liable to any of the subsidies already mentioned, except the old subsidy, and some goods liable to that subsidy, had by the acts imposing the other subsidies been exempted therefrom.

It is moreover enacted by the 8 G. 1. c. 15. § 7. “ That for the  
 “ further encouragement of the *British* manufactures, the several  
 “ and respective subsidies and duties whatsoever, payable to his  
 “ Majesty, his heirs or successors, by any law now in force, upon  
 “ the exportation of any goods, or merchandizes, of the produce  
 “ or manufacture of *Great Britain*, shall cease, determine, and  
 “ be no longer due or payable, for so much of the said goods or  
 “ manufactures as shall from thenceforth be exported.”

But by § 8. it is provided, “ That this act or any thing herein  
 “ contained shall not extend, or be construed to extend, to deter-  
 “ mine, alter, or lessen, the several or respective subsidies of pound-  
 “ age, or other duties, payable upon the exportation of allum,  
 “ lead, lead ore, tin, leather tanned, copperas, coals, wool, cards,  
 “ white woollen cloths, *lapis calaminaris*, skins of all sorts, glue,  
 “ coney hair or wool, hares wool, hair of all sorts, horses, and  
 “ litharge of lead; any thing herein contained to the contrary not-  
 “ withstanding.”

By the 11 G. 1. c. 7. after reciting, that it had been provided in the book of rates referred to by an act of the twelfth year of the reign of King *Charles* the Second, that if there should be brought into this realm any goods liable to the payment of custom or subsidy, which either were omitted in the said book, or were not then used to be brought in, or by reason of the great diversity of the value of some goods could not be rated; that in such case every customer or collector for the time being should levy the subsidy of poundage granted by that act according to the value and price of such goods, to be affirmed upon the oath of the merchant, in the presence of the customer, collector, comptroller, and surveyor, or any two of them; and that in the subsequent acts, by which a subsidy of poundage or duties upon particular goods had been imposed, the like provision as to all goods thereto liable and not rated in the said book of rates was made; and that it had been found by experience, that the value of the several sorts of goods, usually imported and not rated in the said book of rates, which is sworn

to or affirmed by the importers, according to which the said subsidies and other duties are to be paid, have been very unequal, some persons greatly undervaluing the same, to the detriment of the revenue and discouragement of the fair traders, it is enacted, "That the several provisions and clauses, contained in the said recited acts and book of rates before mentioned, for ascertaining the value of goods or merchandizes imported according to the oaths or affirmations of the importers, so far as the same relate to the particular goods and merchandizes mentioned, and expressed in a certain book of rates hereinafter mentioned and referred unto, shall be and are hereby repealed and made void."

By § 2. it is enacted, "That in lieu of the said former rates and duties *ad valorem*, repealed by this act, there shall be payable and paid for the said old subsidy the several rates and duties mentioned and expressed in one book of rates, intituled, *An additional book of rates of goods and merchandizes usually imported, and not particularly rated in the book of rates, referred to in the act of tonnage and poundage made in the twelfth year of the reign of King Charles the Second, with rules, orders, and regulations, signed by the Right Honourable Spencer Compton, Esq. Speaker of the Honourable House of Commons*, the said rates and duties to be paid, upon importation of the said goods and merchandizes respectively, into any port or place within this kingdom, and so in proportion for any greater or lesser quantity; which said last-mentioned book of rates, composed and agreed upon by your Majesty's said Commons, and every article, rule, and clause therein contained, shall be and remain during the continuance of the said act of tonnage and poundage of full force, and shall be put in execution as fully and effectually, to all intents and purposes, as if the same were particularly inserted in this present act."

By § 3. it is enacted, "That in all cases where any of the goods or merchandizes, mentioned in the said book of rates, are by law subject or liable to any of the subsidies or duties, according to the respective values set thereon for the said old subsidy, or in proportion thereto, the same shall be paid proportionally, according to the particular value set thereon in the said book of rates last mentioned, for the old subsidy aforesaid, and not according to the oath or affirmation of the importer; any thing in the respective acts which granted the said duties, or in any other act, to the contrary notwithstanding."

By § 7. after reciting, that it may happen, that several goods and merchandizes may be imported which are omitted to be rated in either of the said books of rates, it is enacted, "That, in such case, the value and price of such goods and merchandizes shall be ascertained by the oath or affirmation of the merchant, in the presence of the customer, collector, comptroller, and surveyor, or any two of them, and the old subsidy, or other duties which are payable in proportion to the said old subsidy, shall be paid according to such value and price."

By § 8. it is enacted, “ That for the better preventing of frauds  
 “ to the revenue, and that all merchants may be upon a more  
 “ equal foot in trade, it shall and may be lawful for the collector  
 “ and comptroller, or other proper officers of the customs, to open,  
 “ view, and examine such goods and merchandizes paying duty  
 “ *ad valorem*, and compare the same with the value and price  
 “ thereof so sworn to or affirmed; and if upon such view and ex-  
 “ amination it shall appear, that such goods and merchandizes  
 “ are not valued by such oath or affirmation according to the true  
 “ value and price thereof, according to the true intent or mean-  
 “ ing of this or any other act or acts of parliament, that then and  
 “ in such case the importer or proprietor shall, on demand made  
 “ in writing by the customer, or collector and comptroller of  
 “ the port, where such goods and merchandizes are entered, de-  
 “ liver or cause to be delivered all such goods and merchandizes  
 “ into his Majesty’s warehouse at the port of importation, for the  
 “ benefit of the crown; and upon such delivery the customer or  
 “ collector of such port, with the privity of the comptroller, shall  
 “ out of any money in his hands, arising by customs or other du-  
 “ ties belonging to the crown, pay to such importer or proprietor  
 “ the value of such goods or merchandizes, so sworn to or affirm-  
 “ ed for the said old subsidy as aforesaid, together with the addi-  
 “ tion of the customs and other duties paid for such goods, and  
 “ of ten pounds *per centum* over and above the value thereof,  
 “ taking a receipt for the same from such importer or proprietor,  
 “ in full satisfaction for the said goods as if they had been regu-  
 “ larly sold; and the respective commissioners of the customs  
 “ shall cause the said goods to be fairly and publickly sold for the  
 “ best advantage, and out of the produce thereof the money so  
 “ paid or advanced as aforesaid shall be repaid to such collector,  
 “ to be replaced to such funds from whence he borrowed the  
 “ same, and the overplus, if any, shall be paid into his Majesty’s  
 “ Exchequer towards the sinking fund; any law, custom, or usage  
 “ to the contrary, in any wise notwithstanding.”

By the 21 G. 2. c. 2. § 1. it is enacted, “ That over and above  
 “ all subsidies of poundage, and over and above all additional du-  
 “ ties, impositions, and other duties whatsoever, by any other act  
 “ or acts of parliament, or otherwise howsoever, already due and  
 “ payable, or which ought to be paid to his Majesty, his heirs or  
 “ successors, for or upon any goods or merchandizes which shall  
 “ be imported or brought into the kingdom of *Great Britain*, one  
 “ further subsidy of poundage, of twelve pence in the pound,  
 “ shall be paid to his Majesty, his heirs and successors, upon all  
 “ manner of goods and merchandizes, to be imported or brought  
 “ into this realm, or any of his Majesty’s dominions to the same  
 “ belonging, by the importer of such goods or merchandizes, be-  
 “ fore the landing thereof, according to the several particular  
 “ rates and values of the same goods and merchandizes as the  
 “ same are now particularly and respectively rated and valued in  
 “ the respective books of rates referred to by the acts of the  
 “ twelfth year of the reign of King *Charles* the Second and the

“eleventh year of the reign of his late Majesty, or by any other act or acts of parliament; or which do now pay any duty *ad valorem*.”

By § 4. it is provided, “That nothing in this act contained shall extend, or be construed to extend, to any goods or merchandizes which were or are now allowed, by the said act of the twelfth year of the reign of King *Charles* the Second, or any other act or acts of parliament, to be imported duty free, nor to any prohibited goods or merchandizes which may be imported by the United *East-India* Company.”

1 Bl. Com.  
316. by  
Christian.

[The above books of rates, however, are now declared to be of no avail by the statute of 27 *Geo. 3. c. 13.* called the consolidation act. By this statute all the former statutes imposing duties on customs and excise are repealed with respect to the *quantum* of the duty; and all the former duties are consolidated, and ordered to be paid according to a new book of rates annexed to the statute. All the articles enumerated in that book, pay, upon importation or exportation, the sum therein specified, according to their weight, number, or measure. And all other goods and merchandize, not being particularly enumerated or described, and permitted to be imported and used in *Great Britain*, shall pay upon importation 27 *l. 10 s. per cent. ad valorem*, or for every 100 *l.* of the value thereof; but subject to a drawback of 25 *l. per cent.* upon exportation. Very few commodities pay a duty upon exportation; but, where that duty is not specified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and shipped; but on failure thereof, they are subject to a duty of 5 *l. 10 s. per cent. ad valorem*. And to prevent frauds in the representation of the value, a very simple and equitable regulation is prescribed by the act, viz. the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price which he himself fixed upon them, with an advance of 10 *per cent.* besides all the duty which he may have paid; and they may then order the goods to be publicly sold, and if they raise any sum beyond what was paid to the owner, and subsequent expences, one half of the overplus shall be paid to the officer who made the seizure, and the other half to the publick revenue.]

Divers kinds of goods, wares, and merchandizes, besides being liable to all the subsidies and poundage, are moreover liable to certain duties, imposed by particular acts of parliament.

Vaugh. 166,  
167, 168.  
Sheppard v.  
Gosnold.  
12 C. 2. c. 4  
§ 1.  
[The point

It has been holden, that goods thrown on shore, from a ship which has been wrecked, are not liable to any duties; because they are not to be considered as brought into the kingdom by any of the king's natural-born subjects, or by any other person or stranger, but by the wind and sea.

determined in the case of *Sheppard v. Gosnold* was, that for goods not intended to be imported into England, and which were wrecked, no customs were due: for it was expressly found by the jury, that the goods in question were shipped in foreign parts, as merchandize, and not intended to be imported into England, but to be carried into other foreign parts. — The question, whether goods wrecked were custom-  
able,



able, had long depended without receiving any judicial opinion. In Queen Elizabeth's time, it was raised upon a record, but not decided. To an information claiming goods as forfeited under the stat. of 1 E. 6. because they had been landed without the customs due for them having been paid or agreed for, the defendant justified as vendee of the Lord Cobham, upon whose manor they had been wrecked, and who had seized them under a prescriptive right to wreck of the sea appurtenant to his manor. It does not appear, whether in this case the question was ever argued, the reporter only adds, *Quare si sit bona justificatio*. Saunders's case, Moor, 224. In the mean time the practice had uniformly been in favour of the claim of the crown, and the case of Sheppard v. Gosnold was not generally considered as countervailing it. The question therefore was again raised: Molloy (lib. 2. c. 5. § 9.) says, that in the like case in all circumstances, Hil. 6 W. 3. C. B. between Power and Sir Wm. Portman, the judges, and more particularly Treby, Ch. J. seemed to be of opinion, that goods wrecked, or flotsam, should pay custom. The matter, however, appears to have been brought in that same year to a final decision in the case of Courtney v. Bower, which was an action brought by Sir Wm. Courtney as lord of the manor of Soar in Devonshire, against two custom-house officers, for seizing goods that had been wrecked upon that manor. The cause was tried before Holt at Exeter, who was with difficulty prevailed with to allow it to be found specially, conceiving the law to have been thoroughly settled by the case of Sheppard v. Gosnold. The special verdict was argued four times in the court of Common Pleas, where it was at length adjudged by three judges against the claim of the crown; but Treby, Ch. J. being of a contrary opinion, a writ of error was brought in B. R., where the judgment was affirmed simply upon the authority of the case of Sheppard v. Gosnold. 1 Ld. Raym. 501. Whether this case of Courtney v. Bower were the same in all its circumstances with that of Sheppard v. Gosnold, we are not informed; but the reporter states it as a general proposition, that for wreck and flotsam no customs ought to be paid. Lord Holt, too, upon this case being mentioned a few years afterwards, said, that always since the case of Sheppard v. Gosnold, it had never been a doubt, but that wreck should not pay custom; and that if the case of Courtney v. Bower had been in B. R. he would not have suffered more than one argument, and that *pro forma tantum*. 1 Ld. Raym. 588.—But though no custom be due for wreck, yet another question arises: Where are the goods to be deposited till it shall appear whether they are wreck or not? By the stat. of 27 E. 3. c. 13. no goods are wreck, but where no property can appear in any person; for although no living creature be saved out of a ship wrecked, as it is said in stat. 3 E. 1. c. 4., yet, if the owner's property can be made out by marks, cocket, letter, or otherwise, the owner shall have his goods, paying what is reasonable for salvage; and he hath a year and a day given him by the 3 E. 1. to prove his property. Therefore it should seem, the lord of a manor, or vice-admiral, hath no right to seize any wrecked goods, till that time be expired; but they ought to be preserved as directed by 3 E. 1. and 4 E. 1. *de officio coronatoris*, that is, to be placed, so as the town where they shall be found may be charged with them during that time. And in regard if any owner of the goods should make out his property to them, he will be liable to pay the customs, if he do not export them again (as he may) but sell them, here it seems, the officers of the customs should take care by keeping the goods by consent of the towns that would be answerable for them, or by delivering them to the towns, to be secured, that if any owner can be made out within the year and the day, the king shall have his customs; and the lord of the manor, or vice-admiral, claiming wreck, hath no right to take the goods from them till after the year and day by the express provision of stat. 3 E. 1.—In the mean time, if the goods are of a perishable nature, it is usual to permit the lord of the manor, or vice-admiral, to dispose of them, upon giving security for the payment of the customs, if any should appear to be due. It has indeed been determined, that the sheriff may in such case make sale of them. Eyfson v. Studd, Plowd. Comm. 465, 466. See too, 5 Burr. 2738.]

In an action of trover, for the conversion of 14 shirts, a night-gown, and a cap, a case was made for the opinion of the court. It was stated, that the plaintiff arrived at *Dover from France*, and brought the goods with him as his own wearing apparel, and not as merchandize or for sale; and that the defendant seized them for non-payment of duty. Upon the first argument, the court inclined strongly for the plaintiff; but a further argument was ordered. At another day the Attorney-General came into court, and said; that, it being stated particularly, that the goods were not imported as merchandize, it was too much for him to endeavour to support the seizure: but that, if it had stood only upon the words that he did not bring them in for sale, he would have endeavoured to have supported it.

[It has been adjudged, that ships taken as prize by a *British* man of war, are, upon sale, liable to the duty of 5 l. *per cent. ad valorem* charged upon goods and merchandizes by the statute of 12 Car. 2.

Str. 943.  
Chapman v. Lamb.

Campb'n v. Bullman, Parker, 198.  
[The act of

But

34 G. 3.  
c. 70. ex-  
empts ships  
of war, and  
private ships,  
taken as  
prize, from  
the payment  
of any duty  
whatever.]

But it was determined in this same case, that *French-made sails*, belonging to a *French ship* so taken, were not chargeable with the additional duty of 1*d.* an ell by 12 *Ann. sess.* 1. c. 16. and 19 *Geo.* 2. c. 27. for the plain intent of the provisions of these acts was, that *British ships* should be furnished with *British sails*; and if they used foreign-made sails, that the additional duty should be paid for them. But it would be absurd to extend them to the sails of foreign ships brought in by capture, which must be supposed to be furnished with sails of the manufacture of their own country.]

### 3. Of the Duties to which Aliens are liable.

Aliens are subject to some duties, which are not paid by natural-born subjects, or by persons naturalized by act of parliament.

By the 11 *H.* 7. c. 14. it is enacted, "That all merchant  
"strangers and others, that be made denizens by the king's let-  
"ters patent or otherwise, shall pay such customs and subsidies  
"for their goods and merchandize, inwards and outwards, as they  
"should have paid if such letters patents had never been made."

The practice of imposing extraordinary duties upon aliens is very ancient.

Rot. Chart.  
31 E. 1.  
n. 44.  
27 E. 3.  
c. 26.  
2 Inst. 59.  
12 E. 4. c. 3.

By the *charta mercatoria* aliens were liable to a higher duty upon wools, wool-fells, and leather exported than natural-born subjects; and they were likewise to pay a duty of three pence in the pound upon all other goods imported, except wine.

In the reign of *Edward the Third*, the subsidy of tonnage was six shillings *per ton* upon the wine of aliens; whereas that of *English* merchants was only half that sum; and the subsidy of poundage was two shillings upon the goods of aliens; whereas that of the *English* merchants was only one shilling.

The extraordinary duties paid by aliens being heretofore, to distinguish them from the larger duties paid by *English* merchants as well as aliens, called *parve custuma*, all extraordinary duties, at this day paid by aliens, are accounted for by the name of petty customs.

By the statute imposing the old subsidy of tonnage, aliens are to pay for some sorts of wine one-third, for others one-fourth, and for others one-fifth more duty than is paid by *English* merchants.

The same extraordinary duties of tonnage are imposed upon aliens, by the statutes imposing the further subsidy, the one-third subsidy, and two-thirds subsidy, as are imposed by the act granting the old subsidy.

The duty of two shillings *per ton*, called butlerage, granted by *charta mercatoria*, is at this day to be paid by merchant strangers, upon all wine imported by them.

By the statute, imposing the old subsidy of poundage, it is enacted, "That of every twenty shillings value, of any of the native  
"commodities of this realm, or manufactures wrought of any  
"such commodities, to be carried out of this realm by any mer-  
"chant

“chant alien, according to the value thereof in the book of rates  
 “hereinafter referred to or expressed, twelve pence in the pound  
 “shall be paid, over and above the subsidy of twelve pence in the  
 “pound to be paid by *English* merchants.”

By the book of rates, *art.* 12. it is ordered, “That merchant  
 “strangers, who according to the rates and values in this book  
 “contained do pay double subsidy for lead, tin, and woollen cloth,  
 “shall also pay double custom for native manufactures of wool  
 “or part wool; and the said strangers are to pay upon all other  
 “goods, as well inwards as outwards, rated to the subsidy of  
 “poundage, three pence in the pound, or any other duty payable  
 “by *charta mercatoria*, besides the subsidy.”

But by the 25 *C. 2. c. 6. § 1.* it is enacted, “That so much of  
 “such clauses of the statute of the twelfth year of our sovereign  
 “lord the king, that now is, and of the twelfth article of the  
 “book of rates therein mentioned, and of all other clauses con-  
 “tained in any other act or statute of this realm whatsoever, as  
 “do any ways concern any custom or subsidy upon any of the  
 “native commodities of this kingdom (except coals) or manu-  
 “factures wrought or made in this kingdom or town of *Berwick*  
 “upon *Tweed*, to be exported out of this realm, payable by any  
 “merchant alien made denizen, or other stranger or alien, over  
 “and above the custom and subsidy payable by his Majesty’s na-  
 “tural-born subjects, be hereby repealed.”

By the 12 *C. 2. c. 18. § 9.* it is enacted, “That for prevent-  
 “ing the great frauds, daily used in colouring and concealing  
 “aliens’ goods, all wines of the growth of *France* or *Germany*,  
 “which shall be imported into *England, Ireland, Wales*, or town  
 “of *Berwick upon Tweed*, in any other ship or vessel than which  
 “doth truly and without fraud belong to *England, Ireland, Wales*,  
 “or town of *Berwick upon Tweed*, and is navigated with the  
 “mariners thereof as in this act is before directed, and all sorts  
 “of masts, timber, or boards, as also all foreign salt, pitch, tar,  
 “rosin, hemp, flax, raisins, figs, prunes, olive oils, all sorts of  
 “corn or grain, sugar, pot ashes, spirits commonly called brandy  
 “wine or *aqua vite*, wines of the growth of *Spain*, the islands of  
 “the *Canaries* or *Portugal, Madeira*, or the western islands; and  
 “all the goods of the growth, production, or manufacture of  
 “*Muscovy* or *Russia*, which shall be imported into any of the  
 “places aforesaid, in any other than such shipping, and so navi-  
 “gated; and all the currants and *Turkey* commodities, which  
 “shall be imported into any the places aforesaid, in any other than  
 “*English*-built ships, and navigated as aforesaid, shall be deemed  
 “aliens’ goods, and pay all strangers’ customs and duties.”

By § 10. it is enacted, “That for preventing all frauds, which  
 “may be used in colouring or buying foreign ships, no foreign-  
 “built ship or vessel whatsoever shall be deemed or pass as a ship  
 “belonging to *England, Ireland, Wales*, or the town of *Berwick*  
 “upon *Tweed*, or enjoy the privilege of such ship or vessel, until  
 “such time as he or they, claiming the said ship or vessel to be  
 “theirs,

“ theirs, shall make appear to the chief officer or officers of the  
 “ customs, in the port next to the place of his or their abode,  
 “ that he or they are not aliens, and shall have taken an oath,  
 “ before such chief officer or officers, who are hereby authorized  
 “ to administer the same, that such ship or vessel was *bonâ fide*,  
 “ and without fraud, by him or them bought for a valuable con-  
 “ sideration, expressing the same, as also the time, place, and per-  
 “ sons from whom it was bought, and who are his part owners,  
 “ if he have any; all which part owners shall be liable to take  
 “ the same oath, before the chief officer or officers of the customs,  
 “ in the port next to the place of his or their abode, and that no  
 “ foreigner, directly or indirectly, hath any part, interest, or share  
 “ therein; and that upon such oath he or they shall receive a  
 “ certificate, under the hand and seal of the said chief officer or  
 “ officers, whereby such ship or vessel may for the future pass,  
 “ and be deemed, as a ship belonging to the said port, and enjoy  
 “ the privileges of such ship or vessel.”

By the 13 & 14 C. 2. c. 11. § 6. it is enacted, “ That, for the  
 “ better increase of shipping and navigation, the collectors and  
 “ other officers of his Majesty’s customs, in all the ports of *Eng-  
 “ land*, shall make a true and perfect list, attested under their  
 “ hands, of all foreign-built ships belonging to their respective  
 “ ports, for which certificates have been made, according to the  
 “ directions of an act passed in the twelfth year of the reign of  
 “ King *Charles the Second*, intituled, *An act for the increasing and  
 “ encouraging of shipping and navigation*, and transmit the same into  
 “ his Majesty’s court of Exchequer, there to remain upon record:  
 “ and that no foreign ship, that is to say, not built in any of his  
 “ Majesty’s dominions of *Asia*, *Africa*, or *America*, other than such  
 “ as shall *bonâ fide* be bought before the first day of *October* one  
 “ thousand six hundred and sixty-two next ensuing, and be ex-  
 “ pressly named in the said list, shall enjoy the privilege of a ship  
 “ belonging to *England* or *Ireland*, although owned or manned by  
 “ *English*, except only such ships as shall be taken at sea by letters  
 “ of mark or reprisal, and condemnation made in the court of Ad-  
 “ miralty as lawful prize; but all such ships shall be deemed as  
 “ aliens’ ships, and liable to all duties that aliens’ ships are liable  
 “ to by virtue of the said act for the increasing and encouraging  
 “ of shipping and navigation.”

[By the statute of 24 Geo. 3. sess. 2. c. 16. it is enacted, that  
 the petty custom, imposed by 12 Car. 2. c. 4. or additional duty  
 on all the goods of aliens or strangers, shall cease, except the du-  
 ties on goods imported or exported in any foreign ship or vessel,  
 and except also those which had been granted to the city of *Lon-  
 don*, called package and scavage.]

## (E) Of prohibited Goods.

AS the offence of smuggling consists in part in the bringing on shore, or carrying from the shore, of any goods, wares, or merchandize, which are by law prohibited to be brought on shore or carried from the shore, it will be proper to give some account of prohibited goods.

The exportation of some goods, as for instance wool, is prohibited entirely.

The importation of foreign embroidery, and divers other goods, is prohibited entirely.

The suffering of foreign manufactures to be worn in this kingdom must, by exhausting the treasure thereof, and depriving the poor of employment, be very detrimental; but it may be for the benefit of trade to suffer such to be imported, provided they be again exported. Upon this principle, divers of the manufactures of *Persia* and the *East Indies* are allowed to be imported: but it is provided, that they shall be deposited in such warehouses as are approved of by the proper officers of the customs; and that no part of the goods shall be taken thereout, until sufficient security be given, that the same shall be exported to foreign parts, and not landed again in this kingdom.

For the further encouragement of trade and navigation, the person exporting prohibited goods is, in some cases, entitled to a drawback of the duties which were paid on the importation of the goods.

As one of the requisites, necessary to entitle an exporter of prohibited goods to a drawback, is a certificate from the proper officer of the customs, that the duties were paid upon the importation of the goods, such goods are called certificate goods.

Such great improvements have been made in agriculture, that the corn produced in this kingdom is usually more than sufficient for the support of the inhabitants. It follows, that the exportation of corn must in the general be vastly advantageous to the whole nation, as well as to the land owners. To promote this, and that it may be sent to foreign markets as cheap as the corn of other countries, it has been thought proper to allow a bounty, upon the exportation of divers kinds of grain, when the price of the grain does not exceed a certain sum.

In some cases, for the sake of encouraging domestick manufactures, an allowance or premium is granted on the exportation thereof. This is not only done, when they are made of foreign materials which have paid duties on importation, as in the case of wrought silks; but likewise, when they are made of native materials, as in the case of starch and divers other manufactures.

In all these instances, and in every other, wherein a bounty or drawback is paid, or any debenture is made out for the payment of a bounty or drawback, upon the shipping of any goods for exportation, the relanding of the goods is prohibited, in order to prevent the loss which the revenue would thereby sustain, and  
the

the injury which would thereby be done to the fair trader; and a bond is usually entered into, by the person who receives such bounty, drawback, or debenture, with condition, that the goods shall be carried into parts beyond the seas, and not landed again in this kingdom.

(F) Of the pecuniary Penalties and Forfeitures incurred by Persons guilty of Smuggling, or of such Practices as have a direct Tendency thereto.

AS the offence of smuggling is not complete unless some goods, wares, or merchandize, are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices, which have a direct tendency thereto, without being guilty of the offence.

For the sake of preventing or putting a stop to such practices, penalties and forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end, without providing at the same time against the means of accomplishing it.

In treating of the penalties and forfeitures, to which persons guilty of such practices as have a direct tendency to this offence are liable, it is not intended to give an account of the penalties and forfeitures which are inflicted in every particular case. This would be going into a very large field; and it will sufficiently answer the present design, to give a general account of such penalties and forfeitures.

The rule generally adhered to, in the statutes by which penalties and forfeitures are inflicted for offences against the laws relating to the customs, is, that one moiety of the money arising from such penalties and forfeitures shall be to the use of his Majesty, his heirs and successors, the other moiety to the use of such person or persons as shall seize the smuggled or prohibited goods, or inform, sue or prosecute for the same, by action, bill, plaint, or information, in any of the courts of record at *Westminster*, or in the court of Exchequer in *Scotland*: But in some few cases the application of the money is otherwise directed.

1. In Ships at Sea or hovering upon the Coast.

By the 5 G. 1. *cap.* 11. § 3. after reciting, that divers ships and vessels of the burden of fifty tons or under, laden with customable and prohibited goods, pretending to be bound for foreign parts, do frequently lie hovering on the coasts of this kingdom, with intention to run the same privately on shore as opportunity offers, to the great diminution and loss of the revenue and ruin of fair traders; and that, by reason of the said vessels so hovering, frequent opportunities are found for carrying on the clandestine trade of exporting wool, and other staple commodities of

this kingdom prohibited to be exported, it is enacted, " That  
 " where any ship or vessel of the burden of fifty tons or under,  
 " laden with customable or prohibited goods, shall be found ho-  
 " vering upon the coasts of this kingdom, within the limits of  
 " any port, and not proceeding on her voyage to foreign parts,  
 " or to some other port of this kingdom, wind and weather per-  
 " mitting, it shall be lawful, for any officer of his Majesty's cus-  
 " toms to go on board every such ship or vessel, and to take an  
 " account of the lading, and demand and take security from the  
 " master, or other person having the charge of such ship or vessel,  
 " by his bond to be entered into to his Majesty, his heirs and suc-  
 " cessors, in such sum as shall be treble the value of the foreign  
 " goods then on board, with condition that such ship or vessel,  
 " as soon as wind and weather and the state and condition of  
 " such ship or vessel doth permit, shall proceed regularly on her  
 " voyage, and land such foreign goods at some foreign port or  
 " ports; and if such master, or other person having the charge  
 " of such ship or vessel, shall refuse to enter into such bond, or,  
 " having entered into it, shall not proceed regularly on her voyage,  
 " as soon as wind and weather and the state and condition of  
 " such ship or vessel shall permit, unless suffered to make a longer  
 " stay by the collector, or other principal officer of the port where  
 " such ship or vessel shall be, not exceeding twenty days, then,  
 " and in either of the said cases, all the foreign goods so on  
 " board shall and may by any officer of the customs, by the di-  
 " rection of the collector or other principal officer, be brought  
 " on shore and secured; and in case the said goods are custom-  
 " able, the customs and other duties shall be paid for the same;  
 " and if wool, or any prohibited goods, or any goods liable to  
 " forfeiture, are found on board such ship or vessel, the same are  
 " hereby declared subject to forfeiture, and the officers of the cus-  
 " toms may prosecute the same, as also the ship or vessel, in case  
 " she shall be liable to condemnation."

By § 11. so much of this statute, as relates to the hovering of ships or vessels of fifty tons or under, was to have continuance for three years from the twenty-fifth day of *March* one thousand seven hundred and nineteen, and from thence to the end of the then next session of parliament, and no longer.

But it has been from time to time continued, and by the 36 G. 3. c. 40. is continued to the twenty-ninth day of *September* one thousand seven hundred and ninety-five, and from thence to the end of the then next session of parliament.

By 6 G. 1. c. 21. § 31. after reciting, that, by an act of the last session of parliament, a remedy was provided against ships or vessels of fifty tons or under, which lie hovering on the coast within the limits of the ports of this kingdom, and whereas such ships or vessels, in order to elude that law, do lie at anchor or hover on the coasts as near the said limits as may be, it is enacted, " That  
 " if any ship or vessel, of the burden of fifty tons or under, be-  
 " ing in part or fully laden with brandy, shall be found at an-  
 " chor,

“ chor, or hovering, within two leagues of the shore, and not  
 “ proceeding on her voyage, wind and weather permitting, it  
 “ shall and may be lawful to and for the commander of any of  
 “ his Majesty’s ships of war, frigates, or armed sloops, appointed  
 “ for the guard of the coasts, or to and for the commander of any  
 “ yacht, smack, sloop, or other boat, in the service of his Majesty’s  
 “ customs, or to and for any officer of his Majesty’s customs, to  
 “ compel the master, or other person having the charge of such  
 “ ship or vessel, to come into port; and it is hereby declared,  
 “ that such master or other person as aforesaid, as likewise such  
 “ ship or vessel, and the brandy wherewith such ship or vessel is  
 “ laden in part or in whole, shall be subject to the same rules,  
 “ regulations, penalties, and forfeitures, as such cargoes, ships, or  
 “ vessels, and the masters or others taking charge thereof, which  
 “ hover within the limits of any port of this kingdom, are by  
 “ the said act subject unto.”

By § 33. it is enacted, “ That for the preventing of disputes,  
 “ which may arise concerning the admeasurement of ships hover-  
 “ ing on the coast, the following rule shall be observed therein,  
 “ that is to say, take the length of the keel within board so much  
 “ as the treads on the ground, and the breadth within board by  
 “ the midship beam from plank to plank, and half the breadth  
 “ for the depth, then multiply the length by the breadth, and  
 “ that product by the depth, and divide the whole by ninety-four;  
 “ and the quotient shall give the true contents of the tonnage;  
 “ according to which rule the tonnage of all such ships or vessels  
 “ shall be measured and ascertained; any law, custom, or usage to  
 “ the contrary in any wise notwithstanding.”

[By *stat.* 24 G. 3. *sess.* 2. c. 47. and 34 G. 3. c. 50. § 8. if any ship or vessel, having on board any brandy or other spirituous liquors in any cask not containing 60 gallons at the least (except only for the use of the seamen then on board the vessel, not exceeding two gallons for each seaman), or any wine in casks (provided the ship shall not exceed 60 tons burden), or, having on board 6 lbs. of tea or 20 lbs. of coffee, or any tobacco or snuff, exceeding, together or separately, 100 lbs. weight, or any goods liable to forfeiture on being imported, shall be found at anchor, or hovering within the limits hereafter mentioned, *viz.* within a supposed straight line from *Walney Island* in the county of *Lancaster* to *Great Ormshead* in the county of *Denbigh*, from *Burdsey Island* in the county of *Caernarvon* to *Strumble Head* in the county of *Pembroke*, from the *Lizard* in the county of *Cornwall* to the *Prall* in the county of *Devon*, from the *Prall* to the *Bill of Portland* in the county of *Dorset*, from *Cromer* in the county of *Norfolk* to the *Spurn Head* in the county of *York*, from *Flamborough Head* to *Staples* in the county of *Northumberland*; from the *Mull of Galloway* in *Scotland* to the *Point of Ayre* in the *Isle of Man*; such ship or vessel not proceeding in her voyage, (wind and weather permitting) unless in case of unavoidable necessity and stress of weather, (of which the master or person having the charge or command of the vessel shall give notice and make  
 proof



proof before the collector or other chief officer of the customs of any port within the limits of which the vessel shall be found immediately after her arrival within those limits.) then not only the goods, but the vessel, with her guns, ammunition, and furniture shall be forfeited.

The statute of 24 G. 3. § 2. provides, that nothing in that or any former act shall prevent evidence from being received in any suit for the forfeiture of a vessel, on account of goods contained therein, in order to shew, from the smallness of the quantity of such goods, and other circumstances of the case, that they were on board without the knowledge either of the owner or master; and in every case where such proof shall be made, such vessel, (exceeding 100 tons in burden,) shall not be forfeited; but the goods found on board; whether with or without the knowledge of the master, shall be forfeited in such case; and the person in whose custody they shall be found, shall forfeit treble the value thereof. § 3.

If any open boat (not being a whale-boat belonging to any ship or vessel employed in the fisheries in the *Greenland Seas* or *Davis's Straits*, or in any fishery to the southward thereof), which shall be built for rowing or sailing, or for rowing and sailing, being of the length of 14 feet, and under that of 18 feet, to be measured by a straight line from the fore-part of the stern to the aft-side of the transom or stern post aloft; the depth of which shall be greater than in proportion of one inch and one-quarter of an inch to every foot in length, such depth to be taken from the upper part of the plank next the keel to the top of the upper strake, whether such upper strake shall be fixed to the boat, or shall be used as a loose or shifting wash strake, shall be found either upon the water within any port of this kingdom or member or creek thereof, or within four leagues of the coast, or within the distance by this act particularly described; or within any place upon land in this country, such boat shall be forfeited, and may be seized by any officer of the excise or customs, unless she shall have plank of three-quarters of an inch thick, and her timbers one inch and a half square, and not more than nine inches from timber to timber; and such boat being found on board, or belonging to any cutter, lugger, &c., such cutter, lugger, &c. shall be forfeited.

Every cutter, lugger, shallop, or wherry, (of what built soever,) and every vessel of any other description, whose bottom is clench-work, unless square rigged, or fitted as a sloop with standing bowsprits, and every vessel, the length of which shall be greater than in the proportion of three feet and a half to one foot in breadth; every cutter, lugger, shallop, wherry, sloop, smack, or yawl, of which the bowsprit exceeds more than two-thirds of its length from the fore-part of the stern to the aft-side of the stern-post aloft; and every cutter, lugger, shallop, wherry, smack, or yawl, of which the bottom is clench-work, unless such cutter, &c. shall be square rigged, or fitted with a standing bowsprit, the keel of which shall be fixed to the main deck by an iron clasp, such clasp being without bits securely bolted through the bow-

34 G. 3.  
c. 50. § 3.  
10.

24 G. 3.  
stat. 2. c. 47.  
§ 4.  
27 G. 3.  
c. 32. § 1.  
34 G. 3.  
c. 50.

sprit and beam of such deck, and the bowsprit to be steaved or elevated at least two inches in every foot from the strait line of the range of the deck, and rigged with a fixed stay for the jibb to work upon, such stay not being less than a two-inch rope for a vessel of 20 tons, and increasing in size not less than half an inch for every other ten tons, the bowsprit being without any traveller or other materials to conduct the jibb out and in upon the bowsprit, and without any flying jibb set thereon, which shall be found within the above limits; and every cutter, lugger, &c. found within the same limits with arms or ammunition on board without a licence from the Admiralty, shall be forfeited with all her goods, guns, tackle, and furniture.

But these acts do not extend to any vessel on a voyage from *America*, the *East* or *West Indies*, *Africa*, or the *Mediterranean*, so as to subject the same to forfeiture on account of her built, or for having spirits, tea, coffee, tobacco, or snuff on board, or for having arms or ammunition, nor to any ship, cutter, lugger, &c. in the service of the navy, victualling, ordnance, customs, excise, or post-office, on account of her built, or for having on board arms or ammunition; nor to any vessel, cutter, lugger, &c. the owner of which shall have a licence for navigating the same from the commissioners of the Admiralty, on account of her built, or for having on board such arms or ammunition as she shall be licensed  
 27 G. 3. c. 32. to have; nor to any lighters or barges used solely in rivers, or for inland navigation; nor to any vessels which shall have on board any arms or ammunition, regularly entered as merchandize, or for the use of his Majesty's stores or garrisons, being regularly stowed in the hold, or put on board for necessary defence, by licence from the said commissioners; nor to any cutter, lugger, &c. *bonâ fide*, solely employed in the cod, herring, mackerel, or other fisheries carried on from this country, and having on board a sufficient quantity of hooks and lines or nets for properly carrying on such fisheries respectively, and clearing out at some port in this country for that purpose.

For the above licence from the Admiralty, or for the registering of it, no fee shall be demanded. But the owner of every vessel so licensed shall, before she proceeds to sea, bring such licence to the collector of the customs for the port from which she is about to sail, who is required to register the same, and shall also produce the same to the proper officer of the customs of any port at which he shall arrive. And by 27 G. 3. c. 32. § 7. the master of the vessel shall produce the licence to every officer of the customs or excise, who shall board him within the above limits; and if the master shall not have the licence on board, or shall not produce it, or if it is produced without an indorsement, importing that proper security has been given, the vessel shall be forfeited. And the licence shall specify the tonnage of the vessel, and describe whether she is a cutter, lugger, shallop or wherry, or what sort of built she is, and who is the owner, and for what port, &c., or to or from what places she is to sail, and what quantity, number, and sort of arms she is licensed to have on board; and the owner shall also give sufficient  
 8 security

security by bond in double the value thereof, to be approved of by the collector of the customs, with condition, that the said vessel shall not be employed in the importation of any tea or foreign spirituous liquors, or any prohibited goods; or in the exportation of any goods prohibited to be exported, or in the relanding of any goods contrary to law, which are entered for exportation for any drawback, or which are prohibited to be used in *Great Britain*; on failure whereof the licence shall be void, and the vessel liable to seizure. And further, by 36 G. 3. c. 80. § 3. the owner shall give security by bond, that if the vessel so licensed be lost, broken up, or disposed of, the licence shall be delivered up to the officer who took the security within three months after the loss, &c. of the vessel. And in case such licence shall not be delivered up within the above time, the commissioners of the customs may at any time direct it to be cancelled.

By 27 G. 3. c. 32. § 5 & 6. if vessels, having a licence from the Admiralty, shall be found out of the limits therein mentioned, they may be seized; unless it be made appear, to the satisfaction of the commissioners of the customs, that they were driven beyond the prescribed limits by distress of weather.

If a vessel, having a licence to go to any particular port, or to navigate within any particular limits, go out of those limits, she abandons her licence, and may be seized on her return, as having no licence.

Attorney-  
General v.  
Brown,  
Anfr. 720.

It should seem, that a licence to a vessel generally, "*to be employed in the coasting trade*," is not good. But, if a vessel has obtained a licence to navigate to a particular place, or within certain limits, it is not the practice, if she makes another voyage to the same place or within the same limits, to require a fresh licence.]

Anfr. 23.  
724

By 9 G. 2. c. 35. § 23. after reciting, that foreign goods are frequently taken out of ships at sea, without the limits of any port, with intent to be fraudulently landed in this kingdom, it is enacted, "That if any foreign goods shall, by any ship, boat, or vessel whatsoever, be taken in at sea, or put out of any ship or vessel whatsoever, within the distance of four leagues from any of the coasts of this kingdom, whether the same be within or without the limits of any of the ports thereof, without payment of the customs or other duties payable for the same, unless in case of necessity, or for some other lawful reason, of which the master or other person having charge of such ship, vessel, or boat, so taking in the same, shall give immediate notice to, and make proof before the chief officer of the customs of the first port of this kingdom where he shall arrive, such goods shall be forfeited; and the master, or other person having charge of such ship, vessel, or boat, so taking in the same, and all persons who shall be aiding, assisting, or otherwise concerned in the unshipping or receiving the said goods, shall forfeit treble the value thereof; and the ships, boats, and vessels, into which the said goods shall be taken, shall be forfeited, any ship, boat, or vessel so to be forfeited not exceeding the burden of one hundred

“ tons; and the master, purser, or other person having charge of  
 “ such ship or vessel, out of which such goods shall be taken, un-  
 “ less in case of necessity, or for other lawful reason, of which no-  
 “ tice shall be given and proof made as aforesaid, shall also forfeit  
 “ treble the value of the goods so unshipped.”

By the 5 G. 1. c. 11. § 3. it is enacted, “ That in case any fo-  
 “ reign goods, wares, or merchandize shall, by any collier, fisher-  
 “ boat, or other coasting vessel or boat, be taken in at sea, or out  
 “ of any ship or vessel whatsoever, in order to be landed or put  
 “ into any other ship, vessel, or boat, within the limits of any port,  
 “ without payment of the customs and other duties payable for  
 “ the same, such goods, wares, and merchandizes shall be forfeited;  
 “ and the master of such collier, fisher-boat, or other coasting  
 “ vessel or boat, shall forfeit treble the value of such goods, unless  
 “ in case of necessity, of which such master shall immediately  
 “ give notice to, and make proof before the chief officers of the  
 “ customs of the first port of this kingdom where he shall arrive;  
 “ and the master, purser, or other person taking charge of such  
 “ ship or vessel, out of which such goods shall be taken at sea, un-  
 “ less in case of necessity as aforesaid, shall forfeit treble the value  
 “ of such goods so unshipped.”

By § 11. so much of this statute, as relates to the taking in of  
 foreign goods at sea, was to have continuance for three years from  
 the twenty-fifth day of *March* one thousand seven hundred and  
 nineteen, and from thence to the end of the then next session of  
 parliament, and no longer.

But it has been from time to time continued, and by the 36 G. 3.  
 c. 40. is continued to the twenty-ninth day of *September* one  
 thousand eight hundred and two, and from thence to the end  
 of the then next session of parliament.

## 2. In the Shipping or Unshipping of Goods at any Port, Member, or Wharf, not lawfully appointed for such Purposes.

† (a) These  
 limitations  
 being con-  
 trary to the  
 liberty and  
*jus publicum*  
 of ports,  
 could not be  
 imposed  
 without an  
 act of par-  
 liament. Hale De Port. Maris, 100.]

Heretofore goods could only be shipped and unshipped in the  
 great ports, for by 4 H. 4. c. 20. it is enacted, “ That all manner  
 “ of merchandize entering into the realm of *England*, or going  
 “ out of the same, shall be charged and discharged in the great  
 “ ports of the sea (a), and not in creeks or small arrivals, upon  
 “ pain to forfeit all the merchandize so charged or discharged to  
 “ our lord the king; except vessels arriving in such little creeks  
 “ and arrivals, by coercion of tempest of the sea.”

[Besides  
 the ports  
 here men-  
 tioned, there  
 are custom-  
 ers and  
 comptrollers

The great ports of *England*, which are at other times called the  
 ancient or head ports, are *London, Ipswich, Yarmouth, Lynn, Boston,*  
*Hull, Newcastle, Berwick, Carlisle, Chester, Milford, Cardiff, Glou-*  
*cester, Bristol, Bridgwater, Plymouth, Exeter, Poole, Southampton,*  
*Chichester, and Sandwich.*

In the several ports following, viz. *Feverham, Rochester, Dover, Rye, Weymouth, Lyme, Dartmouth,*  
*Barnstable, Minchhead, Aberdowry, Liverpool, Presall, Colchester.]*

But by the 13 & 14 Car. 2. c. 11. § 14. after reciting, that <sup>1 Eliz. c. 11.</sup> whereas, by an act of parliament of the first year of Queen *Elizabeth*, it is ordained, that no goods shall be shipped on board or discharged from any ship or vessel, but from or upon some such open place, key, or wharf, except the port of *Hull*, as her Highness, her heirs and successors, should therefore appoint, by virtue of her Highness's commission, within the port of *London*, and in all ports, creeks, havens, and roads; and whereas, notwithstanding the said act, there are some ports, creeks, and places where customs, collectors, comptrollers, and searchers, and their servants, had then time out of mind been resident, to which no such commissions were sent, nor any place, key, or wharf appointed as by the said act is directed; and whereas also since that time, by reason of the alteration of rivers, streams, channels, and sands, some places then appointed are become unfit, and others more convenient for the discharging and shipping of goods, wares, and merchandize; it is enacted, " That the king's Majesty may from time to time, " by his Highness's commission or commissions out of his court " of Exchequer, appoint all such further places, ports, members, " and creeks, except the town of *Hull*, as shall be lawful for the " landing and discharging, lading or shipping, of any goods, " within the kingdom of *England*, dominion of *Wales*, or town of " *Berwick upon Tweed*, and to what ancient and head ports respectively such places, members, and creeks shall appertain; " and where any such member, place, or creek shall so as aforesaid be appointed, the customer, collector, comptroller, and " searcher of the head port shall, by themselves or their sufficient " deputy or deputies, servant or servants, reside and inhabit for " the entering, clearing, and passing shipping, and discharging of " ships, goods, and merchandize: and, by virtue of the aforesaid " commission or commissions, may likewise set down and appoint " the extents and limits of every port, haven, or creek, within his " Majesty's kingdom of *England*, dominion of *Wales*, and town " of *Berwick*, whereby the extents, limits, and privileges of every " port, haven, or creek may be ascertained and known; and it " shall not be lawful for any person whatsoever to lade or put, or " to cause to be laden or put, from any key, wharf, or other place " on the land, into any ship, vessel, lighter, boat, or bottom, any " goods, wares, or merchandize whatsoever, fish taken by his Majesty's subjects, sea-coal, stone, and bestials, only excepted, to be " transported into any place of the parts beyond the seas, or carried by land into the realm of *Scotland*; or to discharge or lay " on land, or to cause to be discharged or laid on land, out of any " boat, lighter, ship, vessel, or bottom, being not in leak or wreck, " any goods, wares, or merchandize whatsoever, fish taken by his Majesty's subjects, bestials, and salt, only excepted, to be brought " from any of the parts beyond the sea, or by land from the " realm of *Scotland*, but only upon such open place, key, or wharf, " as his Majesty shall from time to time, by virtue of such commission or commissions as aforesaid, appoint in the port of *London* and the members and liberties thereof, or in any other

“ port, place, member, or creek within the kingdom of *England*,  
 “ dominion of *Wales*, and town and port of *Berwick*, without  
 “ special sufferance and leave first had from the commissioners and  
 “ officers of his Majesty’s customs, upon the penalty of the for-  
 “ feiture of all such goods, wares, and merchandize.”

By 6 *Anne*, c. 28. § 18. it is enacted, “ That for the better  
 “ and more effectual ascertaining of the ports, members, creeks,  
 “ and havens in *Scotland*, where goods have been or may be ex-  
 “ ported and imported, and the several keys, wharfs, and other  
 “ places, where the same may be put on board any vessel for  
 “ transportation, or be unladen upon importation, the queen’s  
 “ majesty, her heirs and successors, shall and may from time to  
 “ time, by commission or commissions out of the court of Ex-  
 “ chequer in *Scotland*, appoint all such further places, ports,  
 “ members, and creeks, in *Scotland*, as shall be lawful for the  
 “ landing and discharging, lading or shipping, of any goods,  
 “ wares, or merchandizes, in *Scotland*, and to what ancient and  
 “ head ports respectively such places, members, and creeks shall  
 “ respectively appertain; after which appointment so made, the  
 “ ports, members, and creeks, so appointed, shall be subject to  
 “ and under such regulations, as the like ports, members, and  
 “ creeks, appointed in *England* for exportation or importation  
 “ there, are or ought to be by the laws of *England*.”

### 3. In Ships in Port inward bound.

By the 13 & 14 *C. 2. c. 11. § 2.* it is enacted, “ That no ship  
 “ or vessel, arriving from the parts beyond the seas, shall be above  
 “ three days in coming from *Gravefend* to the place of her dis-  
 “ charge in the river of *Thames*, without touching or staying at any  
 “ wharf, key, or place adjoining to either shore between *Gravef-*  
 “ *end* and *Chester’s Key*, unless apparently hindered by contrary  
 “ winds, drought of water, or other just impediment, to be al-  
 “ lowed by such person or persons as are or shall be appointed  
 “ for managing the customs, the collectors inwards, or other  
 “ principal officers of the customs; and then, or before, the mas-  
 “ ter or purser of such ship or vessel shall make a just and true  
 “ entry upon oath, of the burden, contents, and lading of every  
 “ such ship or vessel, with the particular marks, numbers, quali-  
 “ ties, and contents of every parcel of goods therein laden to the  
 “ best of his knowledge; also where, and in what port she took  
 “ in her lading, of what country built, how manned, who was  
 “ master during the voyage, and who are owners thereof; and in  
 “ all outports or members, to come directly up to the place of  
 “ unloading, as the condition of the port requires and will admit,  
 “ and make entries as aforesaid, upon the penalty of the forfeiture  
 “ of one hundred pounds.”

By § 3. it is enacted, “ That no captain, master, purser, or  
 “ other person, taking charge of a ship or vessel of war, wherein  
 “ any goods, wares, or merchandizes shall be brought from the  
 “ parts beyond the seas, or out of the realm of *Scotland*, shall  
 “ put on board any lighter, boat, or bottom, or lay on land, or  
 “ suffer

“ suffer to be put into any lighter, boat, or bottom, or to be laid  
 “ on land, out of any ship or vessel as aforesaid, any goods, wares,  
 “ or merchandizes whatsoever, before such captain, master, purser,  
 “ or other person taking charge of the ship or merchants’ goods  
 “ for that voyage as aforesaid, shall have signified in writing un-  
 “ der his hand, unto the person or persons, which are or shall be  
 “ appointed for managing the customs, the customer, or collector  
 “ and comptroller inwards of the port where he arriveth, the  
 “ names of every merchant or lader of any goods on board the  
 “ said ship or vessel, together with the number and marks, and the  
 “ quantity and quality of every parcel of goods to the best of his  
 “ knowledge, and shall have answered upon his corporal oath to  
 “ such questions concerning such goods, as shall be publickly ad-  
 “ ministrated to him in the open Custom-house, by such person or  
 “ persons, which are or shall be appointed for the managing of  
 “ the customs, customer, or collector and comptroller, or their de-  
 “ puties, and shall be liable to all searches and other rules, which  
 “ merchant-ships are subject unto by the usage of his Majesty’s  
 “ Custom-house, victualling-bills and entering excepted, upon  
 “ pain to forfeit one hundred pounds.”

The provisions made by this clause are now at an end; it hav-  
 ing been enacted by the 22 G. 2. c. 33. § 2. *Art.* 18. “ That if  
 “ any captain, commander, or other officer of any of his Majesty’s  
 “ ships or vessels shall receive on board, or permit to be received on  
 “ board, such ship or vessel, any goods or merchandize other than  
 “ for the sole use of the ship or vessel, except gold, silver, or jewels,  
 “ and except the goods and merchandizes belonging to any mer-  
 “ chant, or other ship or vessel, which may be shipwrecked, or in  
 “ imminent danger of being shipwrecked, either on the high seas,  
 “ or in any creek, port, or harbour, in order to the preserving them  
 “ for their proper owners, and except such goods or merchan-  
 “ dizes as he shall at any time be ordered to take and receive on  
 “ board, by order of the Lord High Admiral of *Great Britain*, or  
 “ the commissioners for executing the office of lord high admiral,  
 “ for the time being, every person so offending, being convicted  
 “ thereof by the sentence of a court martial, shall be cashiered, and  
 “ be for ever afterwards rendered incapable to serve in any place or  
 “ office in the naval service of his Majesty, his heirs and successors.”

And by § 24. after reciting, that by an act for the more effec-  
 tual suppressing of piracy it is amongst other things enacted,  
 that the captain, commander, or other officer of the said ship or  
 vessel of war, and all and every the owners and proprietors of  
 such goods and merchandizes put on board such ship or vessel of  
 war as aforesaid, shall lose, forfeit, and pay the value of all and  
 every such goods and merchandizes so put on board as aforesaid,  
 it is enacted, “ That if any captain, commander, or other officer,  
 “ of any of his Majesty’s ships or vessels shall receive on board,  
 “ or permit or suffer to be received on board such ship or vessel  
 “ any goods or merchandizes, contrary to the true intent and  
 “ meaning of the eighteenth article in this act before mentioned,  
 “ and hereby enacted, every such captain, commander, or other

“ officer shall for every such offence, over and above any punishment inflicted by this act, forfeit and pay the value of all and every such goods and merchandizes so received or permitted or suffered to be received on board as aforesaid, or the sum of five hundred pounds of lawful money of *Great Britain*, at the election of the informer or person who shall sue for the same, so that no more than one of these penalties or forfeitures shall be sued for or recovered, by virtue of this and the said in part recited act, or either of them, against the same person, for one and the same offence.”

By 13 & 14 C. 2. c. 11. § 22. it is enacted, “ That no ship, vessel, or boat, appointed and employed ordinarily for the carriage of letters and packets, shall, unless it be in such cases as shall be allowed by the person or persons which are or shall be appointed to manage his Majesty’s customs, customer, or collector and comptroller, import any goods and merchandizes from the parts beyond the seas, upon the penalty of the forfeiture of one hundred pounds, to be paid by the master of the said vessel or boat, with the loss of his place; and all goods and merchandizes, that shall be found on board any such ship, vessel, or other boat, shall be forfeited.”

By § 4. it is enacted, “ That the person or persons which are or shall be appointed for managing the customs, and the officers of the customs and their deputies, are hereby authorized and enabled to go and enter on board any ship or vessel, as well ships of war as merchant ships, inward bound, and from thence to bring on shore into his Majesty’s storehouse all small parcels of fine goods, or other goods, which shall be found in cabins, chests, trunks, or other small package, or in any private or secret place, in or out of the hold of the ship or vessel, which may occasion a just suspicion that they were intended to be fraudulently carried away, and all other sorts of goods whatsoever, for which the duties of tonnage or poundage were not paid, or compounded for, within twenty days after the first entry of the ship, to be put and remain in the storehouse aforesaid, until his Majesty’s duties thereupon be justly satisfied, unless the person or persons, which are or shall be appointed for managing the customs, and officers of the customs, shall see just cause to allow a longer time; and that the said person or persons which are or shall be appointed for the managing of the customs, and the officers of the customs and their deputies, may freely stay and remain on board, until all the goods are delivered and discharged out of the said ship or vessel; and if any master, purser, boatswain, or other taking charge of any ship or vessel, or any other person whatsoever shall suffer any trufs, bale, pack, fardel, cask, or other package, to be opened on board the said ship or vessel, and the goods therein to be embezzled, carried away, or put into any other form or package, after the ship comes into the port of her discharge, in every such case the said master, purser, boatswain, or other person, shall forfeit the sum of one hundred pounds.”



This act could only extend to the duties of tonnage and poundage imposed by 12 C. 2. c. 4. and such other duties as were payable at the time it was made; but it may once for all be observed, that in every subsequent act of parliament, made for imposing a further duty of tonnage or poundage in general, or a further duty upon any particular sort of merchandize, it is constantly provided, that all the clauses, powers, directions, penalties, forfeitures, matters, and things whatsoever, contained in any law or statute then in force, for the raising, levying, securing, collecting, answering, and paying the former duties, shall be applied, practised, and put in execution, for raising, levying, securing, collecting, answering, and paying the duty by such act granted, as fully and effectually, and to all intents and purposes, as if all and every the said clauses, powers, directions, penalties, and forfeitures were particularly repeated, and again enacted in the body of such act.

4 W. & M.  
c. 5. s. 4.  
9 & 10 W. 3.  
c. 23. s. 7.  
8 G. c. 15.  
s. 12.  
21 G. 2. c. 2.  
s. 3. and di-  
vers other  
acts.

By the 12 C. 2. c. 4. § 2. it is enacted, " That if any goods or merchandize shall be brought from the parts beyond the seas, into any port, place, or creek of this realm or other your Majesty's dominions, and be unshipped to be laid on land, the subsidy, customs, and other duties due or to be due for the same not being paid, or lawfully tendered to the collector thereof or his deputy, nor agreed with for the same in the Custom-house, according to the true intent and meaning of this act, all the said goods and merchandizes whatsoever shall be forfeited."

By 13 & 14 C. 2. c. 11. § 7. it is enacted, " That if any goods or merchandize shall be laden or taken from and out of any ship or vessel, coming in and arriving from foreign parts, into any bark, hoy, lighter, barge, boat, or wherry, without a warrant and the presence of one or more officers of the customs, such bark, hoy, lighter, barge, boat, or wherry shall be forfeited, and the master, purser, boatswain, or other mariner of any ship inward bound, knowing and consenting thereunto, shall forfeit the value of the goods so unshipped."

By the 8 Anne, c. 7. § 17. it is enacted, " That if any sort of goods whatsoever, liable to the payment of duties, shall be unshipped, with intention to be laid on land, the customs and other duties not being first paid or secured, or, if any prohibited goods whatsoever shall be imported into any part of Great Britain, then not only the said uncustomed and prohibited goods shall be forfeited, but also the persons, who shall be assisting or otherwise concerned in the unshipping the said uncustomed or prohibited goods, shall forfeit treble the value thereof, together with the vessels and boats made use of for landing the aforesaid goods."

By the 13 & 14 C. 2. c. 11. § 7. it is enacted, " That if any wharfinger or keeper of any wharf, crane, or key, or their servants, or any of them, shall take up or land, or knowingly suffer to be taken up or landed, at any of their said wharfs, cranes, or keys, any goods, wares, or merchandizes prohibited, or whereof any custom, subsidy, or other duties are due and payable, without the presence of some of the officers of the

" customs

“ customs thereunto appointed, or at the hours and times not  
 “ appointed by law, except in the port of *Hull*, as in the  
 “ statute of the first year of *Queen Elizabeth*, chapter the eleventh  
 “ is excepted, all and every such wharfinger and keeper of  
 “ such wharf, crane, or key, shall forfeit the sum of one hundred  
 “ pounds.”

By 1 *Eliz. c. 11. § 2.* it is enacted, “ That it shall not be law-  
 “ ful for any person or persons whatsoever to take up, discharge,  
 “ and lay on land, or cause or procure to be taken up or discharged  
 “ out of any lighter, ship, crayer, vessel, or bottom, not being in a  
 “ leak or wreck, and laid upon land, any goods, wares, or mer-  
 “ chandizes whatsoever, fish taken by any of her Highness’s sub-  
 “ jects and salt only excepted, to be brought from any the parts  
 “ beyond the seas or the realm of *Scotland*, but only in the day-  
 “ light, that is to say, from the first of *March* until the last of  
 “ *September*, betwixt sun-rising and sun-setting; and from the last  
 “ of *September* until the first day of *March*, betwixt the hours of  
 “ seven in the morning and four in the afternoon, upon pain of  
 “ forfeiture of all such goods, wares, and merchandizes.”

[By 27 *G. 3. c. 13. § 12.* & 36 *G. 3. c. 82.* “ if any goods, wares,  
 “ or merchandizes imported into this country, (except diamonds,  
 “ jewels, pearls, precious stones, and bullion, and fresh fish, *British*  
 “ taken and imported in *British*-built ships or vessels owned, navi-  
 “ gated, and registered according to law, and also except turbot and  
 “ lobsters, however taken or imported,) whether such goods, wares,  
 “ or merchandizes are or shall be liable to duty or not, shall be un-  
 “ shipped or landed without the presence of the proper officer of  
 “ the customs, either on *Sundays*, holidays, or any other days, all  
 “ such goods shall be forfeited, and may be seized by any officer  
 “ of the customs.”]

By the 13 & 14 *C. 2. c. 11. § 21.* it is enacted, “ That all fo-  
 “ reign goods or merchandizes, which, by the person or persons  
 “ which are or shall be appointed for managing the customs, and  
 “ the customer, collector, and comptroller, shall be permitted to  
 “ be landed and taken up by bills at sight, or bills at view or  
 “ sufferance, shall be landed at the most convenient keys or  
 “ wharfs where the said person or persons, customer, or collector  
 “ and comptroller, shall appoint, and not elsewhere; and there  
 “ or in his Majesty’s storehouse, at the election of the said person  
 “ or persons and officers, shall be measured, weighed, and num-  
 “ bered, by and in the presence of the officers to be thereunto  
 “ particularly appointed; which officers, so appointed, shall per-  
 “ fect the entry, and thereunto subscribe their names, and the  
 “ next day following shall give account, and make report, of every  
 “ respective entry, so perfected, to the person or persons or offi-  
 “ cers aforesaid, without reasonable cause to be allowed by the  
 “ said person or persons or officers, or in default thereof shall  
 “ forfeit the sum of one hundred pounds.”

By § 5. it is enacted, “ That if, after the clearing of any ship  
 “ or vessel by the person or persons which are or shall be ap-  
 “ pointed for managing the customs, or any their deputies, and  
 “ discharging

“ discharging the watchmen or tidefmen from attending thereon,  
 “ there shall be found on board such ship or vessel any goods,  
 “ wares, or merchandizes which have been concealed from the  
 “ knowledge of the said person or persons which are or shall be  
 “ appointed for the managing of the customs, and for which the  
 “ custom, subsidy, and other duties, due upon the importation  
 “ thereof, have not been paid, then the master, purser, or other  
 “ person taking charge of such ship or vessel, shall forfeit the sum  
 “ of one hundred pounds.”

By the 5 G. 1. c. 11. § 4. after reciting, that in ships from foreign parts goods are often found, at clearing such ships, concealed in false bulk-heads, between the linings and false knees, or in concealed lockers, in order to their being landed without payment of duties, so that it is almost impossible for the officers of the customs to discover them, without having some previous information, it is enacted, “ That all goods not reported, and found after  
 “ clearing the ship by the proper officer or officers of the customs,  
 “ shall be liable to forfeiture.”

By § 11. so much of this statute, as relates to goods not reported and found after clearing the ship, was to have continuance for three years from the twenty-fifth day of *March* one thousand seven hundred and nineteen, and from thence to the end of the then next session of parliament.

But it has been from time to time continued, and by 36 *Geo.* 3. c. 40. is continued to the 29th of *Sept.* 1802, and from thence to the end of the then next session of parliament.

By the 9 G. 2. c. 35. § 27. after reciting, that in ships from foreign parts goods are often concealed in false bulk-heads, between the linings and false knees, or in concealed lockers, or in the ballast, or in false package and other places, which the officers cannot easily find out or discover, in order to their being landed without payment of duties, and such goods are not liable by law to forfeiture, unless the same be found after clearing the ship by the proper officer or officers of the customs, it is enacted, “ That  
 “ all goods which shall be found concealed as aforesaid, or concealed in any other place, on board any ship or vessel, at any  
 “ time after the master thereof shall have made his report at the  
 “ Custom-house, and which shall not be comprised or mentioned  
 “ in the said report, shall and may be seized and prosecuted by  
 “ any officer or officers of the customs; and the master, purser,  
 “ or other person having the charge or command of such ship or  
 “ vessel, in case it can be made appear that he was any ways  
 “ consenting or privy to such fraud or concealment, shall forfeit  
 “ treble the value of the goods so found.”

#### 4. In Ships in Port outward bound.

By the 13 & 14 C. 2. c. 11. § 3. it is enacted, “ That no captain, master, purser, or any other person taking charge of any  
 “ ship or vessel, bound for the parts beyond the seas or into the  
 “ kingdom

“ kingdom of *Scotland*, whether the same ship or vessel shall have  
 “ commission from, or belong unto, the king’s majesty that now  
 “ is, his heirs or successors, or shall belong to, or have commis-  
 “ sion from, any foreign prince or state, or otherwise, shall take  
 “ in, or suffer to be taken into, or laden aboard such ship or  
 “ vessel any *English* goods, wares, or merchandize, to be exported  
 “ into the parts beyond the sea, or into the kingdom of *Scotland*,  
 “ until such captain, master, purser, or other person, shall have  
 “ entered such ship or vessel in the book of the commissioners,  
 “ customer, or collector and comptroller outwards of such port,  
 “ where he shall load or take in goods, together with the name  
 “ of such captain or master, the burden of such ship or vessel,  
 “ the number of guns and ammunition she carries, and to what  
 “ port or place she intends to pass or sail; and, before he or they  
 “ shall depart with his or their ship or vessel out of such port  
 “ or place, shall bring and deliver, unto the person or persons  
 “ which are or shall be appointed for managing the customs, the  
 “ customer, or collector and comptroller of such port or place,  
 “ a content in writing, under his or their hands, of the names  
 “ of every merchant and other person or persons that shall have  
 “ laden, or put on board, any such ship or vessel any goods or  
 “ merchandize, together with the marks and numbers of such  
 “ goods and merchandize, and shall likewise publicly in the open  
 “ Custom-house, upon his corporal oath to the best of his know-  
 “ ledge, have answered to such question or questions as shall be  
 “ demanded of him by the said person or persons which are or  
 “ shall be appointed for managing the customs, the customer, or  
 “ collector and comptroller, or their deputies, concerning such  
 “ goods and merchandize as shall be aboard such ship or vessel,  
 “ upon pain of forfeiture of one hundred pounds.”

The provisions in this clause, as to officers of ships or vessels  
 belonging to his Majesty, are now at an end; for, as has been al-  
 ready shewn, all such officers are absolutely prohibited from taking  
 any goods, or merchandize, except gold, silver, and jewels, on board  
 for exportation.

By the 13 & 14 C. 2. c. 11. § 22. it is enacted, “ That no ship,  
 “ vessel, or boat, appointed and ordinarily employed for the car-  
 “ riage of letters and packets, shall, unless it be in such cases as  
 “ shall be allowed by the person or persons which are or shall be  
 “ appointed for the managing of the customs, the customer, or  
 “ collector and comptroller, export any goods or merchandize  
 “ into the parts beyond the seas, upon the penalty of the for-  
 “ feiture of one hundred pounds, to be paid by the master of the  
 “ said vessel or boat, with the loss of his place; and all goods and  
 “ merchandize that shall be found on board any such ship, vessel,  
 “ or boat, shall be forfeited.”

By § 4. “ The person or persons which are or shall be appoint-  
 “ ed for the managing the customs, and the officers of his Ma-  
 “ jesty’s customs and their deputies, are authorized and enabled,  
 “ to go and enter on board any ship or vessel outward bound,

“ as well ships of war as merchant ships, and from thence to  
 “ bring on shore all goods prohibited or uncustomed, except  
 “ jewels.”

By the 1 *Eliz. c. 11. § 2.* it is enacted, “ That it shall not be  
 “ lawful for any person or persons whatsoever to lade or put, or  
 “ cause to be laden or put, off from any wharf, key, or other place  
 “ on the land, into any ship, vessel, crayer, lighter, or bottom, any  
 “ goods, wares, or merchandizes whatsoever, fish taken by her  
 “ Highness’s subjects only excepted, to be transported into any  
 “ place of the parts beyond the seas, or into the realm of *Scot-*  
 “ *land*, but only in the day-light, that is to say, from the first of  
 “ *March* until the last of *September*, between sun-rising and sun-  
 “ setting, and from the last of *September* until the first of *March*,  
 “ between the hours of seven in the morning and four in the af-  
 “ ternoon, upon pain of forfeiture of all such goods, wares, and  
 “ merchandizes.”

By the 13 & 14 *C. 2. c. 11. § 7.* it is enacted, “ That if any  
 “ wharfinger or keeper of any wharf, crane, or key, or their ser-  
 “ vants, or any of them, shall ship off or suffer to be water-borne,  
 “ at or from any of their wharfs, cranes, or keys, any goods,  
 “ wares, or merchandizes prohibited, or whereof any custom, sub-  
 “ sidy, or other duties are due and payable, without the presence  
 “ of some of the officers of the customs thereunto appointed, or  
 “ at hours and times not appointed by law, except in the port  
 “ of *Hull* as in the statute of the first year of queen *Elizabeth*  
 “ chapter the eleventh is excepted, all and every such wharfinger  
 “ and keeper shall forfeit the sum of one hundred pounds.”

By the same section, it is enacted, “ That if any goods or mer-  
 “ chandize shall be laden or taken from the shore, into any bark,  
 “ hoy, lighter, barge, wherry, or boat, to be carried on board  
 “ any ship or vessel, outward bound for the parts beyond the seas,  
 “ without a warrant and the presence of one or more officers of  
 “ the customs, such bark, hoy, lighter, barge, wherry, or boat,  
 “ shall be forfeited.”

By the 12 *C. 2. c. 4. § 3.* it is enacted, “ That if any goods or  
 “ merchandize shall be shipped, or put into any boat or vessel, to  
 “ the intent to be carried into the parts beyond the seas, the sub-  
 “ sidy, custom, and other duties due or to be due for the same,  
 “ not paid or lawfully tendered to the collector thereof or his  
 “ deputy, nor agreed with for the same in the Custom-house,  
 “ according to the true intent and meaning of this act, all the said  
 “ goods and merchandizes shall be forfeited.”

By the 12 *G. 1. c. 28. § 18.* after reciting, that great quantities  
 of goods and merchandizes, on which considerable duties are due  
 and payable to his Majesty, and divers sorts of goods prohibited  
 to be exported, are by evil disposed persons frequently shipped for  
 parts beyond the seas, without the presence of the proper officer  
 of the customs, to the great prejudice of the revenue and all  
 fair traders, it is enacted, “ That if any such goods or mer-  
 “ chandizes shall be shipped for parts beyond the seas, without  
 “ a warrant, or without the presence of an officer of the cus-  
 “ toms

“toms appointed for that purpose, all such goods and merchandizes or the value thereof shall be forfeited.”

By the 13 & 14 C. 2. c. 11. § 9. it is enacted, “That if any goods, wares, or merchandize, for which the duties of subsidy or custom are due and payable, shall be secretly conveyed on board any ship or vessel, before the custom and subsidy thereof be duly answered and paid, and shall escape the discovery thereof by the officers of the customs or others, and be carried into parts beyond the seas, in such case the owners or proprietors of such goods, wares, or merchandizes, or other person or persons who shall have so shipped, or caused the same to be so shipped and transported, shall forfeit the double value of the goods, computed according to the book of rates, except for coal, which, so secretly exported as aforesaid, shall pay double the custom and duty due and payable for the same.”

[By 26 G. 3. c. 40. § 15. no vessel shall be cleared out for foreign parts until the master and mate shall severally give bond in the penalty of 200*l.* that they will not land illegally any goods, or take on board goods with that intent, nor will oppose any officer in the execution of his office, or until the master shall produce a certificate from the principal officer of the customs at some other port in *Great Britain* of such security having before been given. The master of any vessel, on board of which goods shall be shipped for exportation, shall upon demand deliver to every officer of the customs who shall come on board, either within the limits of any port there, or within four leagues of the coast, the cockets from the port of clearance, under penalty of 100*l.*; and if such officer find any of the goods not to correspond therewith, he shall seize them as forfeited; or, if he discover that any of the passages indorsed upon the cocket are not on board, the master shall forfeit 20*l.* for each package.

§ 17. If the master of any vessel, inward or outward bound, shall pass the usual places for stationing revenue-officers, or such other places as may hereafter be appointed by the commissioners, without bringing to and receiving the revenue-officers on board, for the purpose of the cargo being examined, and of relieving or landing such officers, unless in case of unavoidable necessity, he shall forfeit 100*l.*

By 27 Geo. 3. c. 32. § 10. where the master of any vessel shall report any bales or other packages for exportation, any officer of the customs may open and examine the contents thereof, or may bring them to his Majesty's warehouse for the port where such report is made. But this act shall not extend to any vessel coming from any port of *Asia*, *Africa*, or *America*.]

### 5. In coasting Vessels.

Coasting vessels, besides being subject to such general rules and regulations as other ships inward and outward bound, are likewise subject to some particular ones.

By the 13 & 14 C. 2. c. 11. § 7. it is enacted, “That if any goods, wares, or merchandizes shall be shipped or put on board,  
“to

“ to be carried forth to the open sea, from any port, creek, or member in the kingdom of *England*, dominion of *Wales*, or town of *Berwick*, to be landed at any other place of this realm, without a fullerance or warrant first had and obtained, from the person or persons which are or shall be appointed for the managing the customs and officers of the customs, all such wares and merchandizes shall be forfeited.”

By the same section it is enacted, “ That the master of every ship or vessel, who shall lade or take in any goods, wares, or merchandizes, in any port, member, or creek within the kingdom of *England*, dominion of *Wales*, or town of *Berwick*, to be landed or discharged in some other port, member, or creek of this realm, shall, before the ship or vessel be removed or carried out of the port where he shall take in his lading, take out a cocket or cockets, and become bound to the king’s majesty, with good security, in the value of the goods, wares, and merchandizes aforesaid, for delivery and discharge thereof in the place or port for which the same shall be entered, or in some other port or place within this realm, and, the dangers and accidents of the seas excepted, to return a certificate within six months after the date of such cocket or cockets, under the hands and seals of his Majesty’s officers, signed also by the person or some one of the persons, which are or shall be appointed for managing the customs, or their deputy or deputies, in every the respective ports, members, or creeks where the same shall be landed and discharged, to his Majesty’s officers of the customs, to whom such security hath been given as aforesaid, that such goods, wares, and merchandizes were there landed and discharged accordingly, upon the penalty of the forfeiture of the bond and security aforesaid.”

By § 8. it is enacted, “ That if any officer of any port, member, or creek, shall grant or make any false certificate of any goods or merchandizes which should have been landed out of any ship or vessel, such officer shall forfeit the sum of fifty pounds, and shall moreover lose his employment, and be incapable of serving his Majesty in any place or trust concerning his customs.”

By the same section it is enacted, “ That if any person shall counterfeit, raise, or falsify any cocket, certificate, or return, transire, let-pafs, or any other Custom-house warrant, he shall forfeit one hundred pounds; and the cocket, certificate, or return shall be invalid and of none effect.”

By the 9 G. 1. c. 21. § 8. after reciting, that frauds are many times committed, under the pretence of carrying foreign goods or merchandizes coastwise, by masters of coasting vessels, who take in such goods at some place other than the port from whence they are certified, to the prejudice of the revenue and the encouragement of the foul trader, it is enacted, “ That if any foreign goods or merchandizes shall be taken on board any coasting vessel, in parts beyond the sea, or out of any ship at sea, or in  
“ any

“ any port or place of this kingdom, other than the port or place  
 “ from whence such goods shall be certified, the said goods and  
 “ double the value thereof shall be forfeited, and the master of the  
 “ said vessel shall forfeit the value of the said goods.”

By the 9 G. 2. c. 35. § 29. it is enacted, “ That it shall and  
 “ may be lawful to and for any officer or officers of the customs,  
 “ producing his or their warrant or deputation, or warrants or  
 “ deputations, if required, to go on board and enter into any  
 “ coasting ship or vessel, which shall be within the limits of any  
 “ of the ports of this kingdom, and to rummage and search the  
 “ cabin, and all other parts of all such coasting ships or vessels,  
 “ for prohibited and uncustomed goods, and such officer and offi-  
 “ cers is and are hereby authorized and empowered to stay and  
 “ remain on board all such ships and vessels, during the whole  
 “ time that the same shall continue within the limits of any such  
 “ port as aforesaid; and if any person or persons shall obstruct,  
 “ oppose, molest, let, or hinder, any officer or officers of the  
 “ customs in going and remaining on board any such coasting  
 “ ship or vessel, or in entering and searching the cabin or any  
 “ other part thereof, every such person or persons shall for every  
 “ such offence forfeit the sum of one hundred pounds.”

By the 8 G. 1. c. 18. § 18. after reciting, that foreign goods are  
 frequently taken in at sea by masters of coasting vessels, who pri-  
 vately land the same, to the prejudice of the revenue and the en-  
 couragement of the foul trader, it is enacted, “ That if any goods,  
 “ brought or coming into any port within the kingdom of *Great*  
 “ *Britain*, from any other port within the said kingdom, by coast  
 “ cocket, transire, let-pafs, or certificate, shall be unshipped, to  
 “ be landed or put on shore, before such cocket, transire, let-  
 “ pafs, or certificate shall be delivered to the customer, or col-  
 “ lector and comptroller, of the port or place of her arrival, and  
 “ warrant of sufferance made and given from such customer, or  
 “ collector and comptroller, for the landing and discharging  
 “ thereof, the master, purser, boatswain, or other mariner taking  
 “ charge of such ship or vessel, out of which the goods shall be  
 “ landed or put on shore, knowing and consenting thereunto,  
 “ shall forfeit the value of the goods so unshipped; and if any  
 “ goods of foreign growth, production, or manufacture, coming  
 “ coastwise as aforesaid, shall be landed without the presence  
 “ of an officer of the customs, such foreign goods or the value  
 “ thereof shall be forfeited; any law, custom, or usage to the  
 “ contrary notwithstanding.”

By § 27. this statute was to have continuance for two years,  
 from the twenty-fifth day of *March* one thousand seven hundred  
 and twenty-two, and from thence to the end of the then next  
 session of parliament.

But it has been continued from time to time, and by the  
 36 G. 3. c. 40. is continued, except the clauses therein con-  
 tained, obliging all ships and vessels to perform quarantine, to the  
 twenty-ninth day of *September* one thousand eight hundred and  
 two,



two, and from thence to the end of the then next session of parliament.

#### 6. In the Case of Certificate and prohibited Goods.

By the 12 G. 1. c. 28. § 17. it is enacted, “ That for the better preventing frauds in the entering for exportation of any goods whereon there is a drawback, bounty, or premium, or of goods prohibited to be worn or used here, to the prejudice of the revenue, it shall and may be lawful to and for any searcher or other proper officer of the customs, after the entry of any of the said goods, and before and after the shipping thereof, to open and strictly examine any bale, chest, truss, or other package, to see that the goods are right entered; and if on such examination the same shall be found rightly entered, the searcher or other officer shall at his own charge cause the same to be repacked, which charge shall be allowed to such officer by the commissioners of the customs, if they think it reasonable: but in case the officer shall, on examination, find such goods to be less in quantity or value than is expressed in the exporter’s indorsement upon his entry, or any that shall be entered under a wrong denomination, whereby his Majesty would have been defrauded, all such goods may be seized, and shall be forfeited, and the owner or merchant shall lose the benefit of receiving the drawback or bounty for such goods, and the value thereof.”

By the 8 Anne, c. 13. § 16. after reciting, that it hath been found by experience that great quantities of foreign goods, after they have been shipped for exportation, have been privately re-landed; and that the remedies already provided by law have not been sufficient to obviate a practice so very prejudicial to the revenue and all fair traders, it is enacted, “ That if any foreign goods, contained or specified in any certificate, whereupon any drawback is to be made, or whereupon any debenture is to be made forth for any such drawback, shall not be really and *bonâ fide* shipped and exported, the danger of the seas and enemies excepted, or shall be landed again in any part of *Great Britain*, unless in case of distress to save the goods from perishing, which shall be presently made known to the person or persons which are or shall be appointed to manage the customs, or principal officers of the port, then not only such certificate goods shall be forfeited, but also the person or persons, being the exporters or any others, who shall bring back, or cause or procure such certificate goods, or any part of them, to be re-landed in any part of *Great Britain*, or be assisting or otherwise concerned in unshipping the same, or by whose privity, knowledge, or direction the said goods, or any part thereof, shall be so re-landed, shall forfeit double the amount of the said drawback for such goods, together with the vessels or boats made use of in the landing or conveying the same.”

By the 5 G. 1. c. 11. § 6. after reciting, that the remedies provided by law to prevent the relanding of goods prohibited to be worn in this kingdom, and of foreign goods shipped out for parts beyond the seas, have been insufficient to put a stop thereto, it is enacted, "That if any such goods shall be unshipped or put " on shore, unless in case of distress to save the ship from perishing, or in the presence of an officer of the customs, the said " goods shall be forfeited; and if the master, purser, or other " person taking care of any ship wherein the said goods shall be " laden, shall suffer or permit any of the said goods to be landed " or unshipped, unless as aforesaid, the said master, purser, or " other person shall forfeit the value of the goods so unshipped " or landed."

By § 7. after reciting, that the persons concerned in carrying on such fraudulent practices do frequently cause the package of such goods to be opened on board the ship during the time she continues in port, whereby they have a better opportunity to reland the said goods, it is enacted, "That if the package of any " such goods shall, with the privity or consent of the master, " purser, or other person taking care of such ship or vessel, be " opened on board any ship or vessel, or put into any other form " or package during the time the said ship or vessel remains in " port, without leave of one or more of the principal officers of " the port, the said master, purser, or other person shall forfeit " one hundred pounds."

By § 11. these two clauses of this statute are only to have continuance for three years, from the twenty-fifth day of *March* one thousand seven hundred and nineteen, and from thence to the end of the then next session of parliament.

But they have been continued from time to time, and are further continued by 36 G. 3. c. 40. to the twenty-ninth of *September* one thousand eight hundred and two, and from thence to the end of the then next session.

[By 26 G. 3. c. 40. no goods shall be imported in any vessel belonging to *British* subjects, unless the master have on board a manifest in writing, signed by him, containing the names of the several ports where the goods mentioned in the manifest shall have been taken on board, the name and built of the vessel, and the true admeasurement or tonnage thereof, according to the register of the same, together with the christian and surname of the master, and the port or place to which the vessel belongs; and a true and particular account of all the cargo, and of all packages of goods so taken on board, with the several marks thereon; and of the particulars of the cargo which is stowed loose; and of the following particulars in words at length, *viz.* the several numbers of the packages, with a particular description thereof; whether leaguer, pipe, butt, puncheon, hoghead, barrel, or other cask or package, describing such other cask or package by its usual or ordinary name; or whether case, bale, pack, truss, chest, box, bundle, or other package, or by such other name or description as the

same is usually called or known. And no wine shall be imported from any place not subject to the crown of *Great Britain* in any ship or vessel whatever, unless there be such manifest on board, verified upon oath by the master, at the place where the wine shall be taken on board, before the *British* consul or other chief *British* officer, if there be any one resident at or near to such place. Before any ship shall clear out for this country from any place in the *British* dominions in foreign parts, the master of her shall deliver a manifest in writing to the chief officer of the customs, at or near to such place, who shall cause a duplicate thereof to be made, and shall indorse on the original manifest his name, with the day and year on which it was produced to him, and shall then return the original to the master, and shall immediately, upon the clearing of the ship, transmit the duplicate under his hand and seal to the collector at the port in this country to which the goods are consigned, and to which the manifest refers. And any master importing goods without a manifest, or not included therein, or importing any wine without a manifest so verified as aforesaid, shall forfeit double the value of the goods, together with the full duties payable on them. The master, on his arrival within four leagues of the *British* coast, is to produce his manifest to the first officer of the customs, who shall come on board, and give him a copy of it, on pain of forfeiting double the value of the goods, and the full duties due thereon; and the officer, having certified such production on the back of the manifest, is to transmit the copy to the proper officer at the port of consignment, under a penalty of 100*l.* If the master or mate of any vessel importing goods shall suffer bulk to be broken in any part of this country, or within the above limits, unauthorized by the proper officer, except in case of unavoidable necessity and distress of weather, of which proof shall be made on oath by the master and two or more of the mariners, he shall forfeit 200*l.* If, upon the arrival of any vessel, there shall be any goods, which must be unavoidably stowed out of the main hold, (except such part of the cargo as is stowed on the chains, or in other parts on the outside of the vessel,) the officer who shall first go on board shall mark or seal such packages in such manner as the commissioners of the customs shall direct, and shall keep a particular account thereof; which mark shall not be altered before the goods contained in such packages shall be landed, by special sufferance in the presence of a superior officer: and if any of such marks shall be defaced with the privy of the master, he and the mate shall forfeit 200*l.* each. The master of any such vessel shall, within 24 hours after her arrival, at such places as shall be appointed by the commissioners of the customs, make entry upon oath, of her built, burden and lading, with the marks and contents of every parcel on board, to the best of his knowledge and belief, and perform every thing in relation thereto before the chief officer of the customs of the port, as directed by 13 and 14 *Car. 2. c. 11.* under the penalty of 100*l.*, to whom he shall at the same time

For the mode of authenticating manifests of ships importing goods from the East Indies and China, see 27 *G. 3. c. 32. § 11.*

deliver his manifest, and on refusal shall forfeit 200 *l.* If the report, manifest, and goods found on board do not agree, the master shall lose 200 *l.* But, where it shall be made appear to the satisfaction of the commissioners, that the cargo imported was wholly taken on board in foreign parts, naming the particular places, that no part thereof has been unshipped, and that the manifest hath been lost without fraud, defaced by accident, or incorrect by mistake, no penalties shall be incurred; and if any goods shall, from urgent necessity, be taken on board of any vessel after the manifest shall have been attested, the master shall make out and sign a separate manifest of all such goods, which manifest shall be subjected to every provision to which manifests properly attested are subjected; and in such case the penalties inflicted with respect to goods imported without a manifest shall not be incurred, if the urgent necessity of so taking such goods on board shall be made appear to the satisfaction of the commissioners. If any part of the cargo shall, after the vessel's arrival within the above limits, or, after the first production of the manifest to the officers of the customs, (whether inserted in the manifest or not,) be thrown overboard or destroyed, (except in case of unavoidable necessity, proof of which shall be made to the satisfaction of the commissioners,) the master shall forfeit 200 *l.* Every importer, &c. of any goods so imported shall, within 20 days after the master of the vessel shall have made his report, or after the expiration of the time within which he is required by law so to do, make a due entry thereof with the proper officer, and pay the duties; and on failure thereof the officers of the customs shall convey the goods to his Majesty's warehouse; and if the duties are not paid within three months, they shall be sold, and the produce applied agreeably to 12 *Ann.*, c. 8. But this shall not apply to the selling of any goods which may by law be entered and warehoused, upon bond given for the duties.

No drawback shall be paid on the exportation of any goods, if they are in bales press-packed, unless the species, quantities, and qualities thereof shall be verified by the master-packer, or, in his absence, by his servant, who shall have actual knowledge of the contents of the bales, in the following manner, *viz.* if the goods are packed at the port of exportation, or within 10 miles thereof, then, by oath subscribed on the entry or cocket, before the chief officer of the customs; and if packed up at any greater distance, then by the like oath made before some magistrate where such master-packer resides.

§ 18. No entry shall pass, nor any debenture be made out, upon exportation of goods entitled to drawback or bounty, but in the name of the real owner, if resident in this country, who, before he receives the drawback, shall, upon the debenture, verify by oath that he is the real owner, and that the goods are *bonâ fide* exported to foreign parts, and have not been relanded in this country: but, if he shall not have a property in the drawback, he shall, at the entry of such goods, acknowledge thereon the person  
 who

who is entitled thereto, who shall, after the requisites of the act are complied with, receive the drawback. But this act shall not prevent the agent of any corporation or company from making oath to entitle them to a drawback; nor any proprietor of lands in any *British* colony, nor any person, from exporting goods from any other place than that of his residence, if he shall reside at any greater distance than 20 miles therefrom, nor any person from exporting from any place, other than that at which he resides, any goods of *British* manufacture (being his property) in the name of an agent, who shall testify on oath, on the back of the debenture, besides what is already by law required to be testified, the name of the real proprietor of the goods, and his place of abode; and shall, if required by the officer, give sufficient reasons for his knowledge of the place to which the goods are to be exported.

§ 19. No bounty shall be paid for any goods exported to *Ireland*, and no drawback or bounty shall be paid for goods exported to *Guernsey* or *Jersey*, nor any debenture made out for the same, until a certificate shall be produced from the collector, comptroller, and surveyor of the customs, or any two of them, in *Ireland*, or from the registrar of certificates, or other chief officer of the customs in *Guernsey* or *Jersey*, at the respective place of importation, certifying that the same have been duly landed there.

Goods entitled to drawback, &c. shall be shipped for exportation by the proper officer only, or such persons as shall be licensed for that purpose by the commissioners; which persons shall, on carrying such goods on board any vessel, give information thereof in writing to the master, for enabling him to give notice as required by this act; and such licence, when granted, shall not be withdrawn, unless the person licensed shall be convicted of some trespass against the revenue laws.

The licences shall be granted to such persons as are by law entitled to put such goods on board, and shall give proper security.]

It may in the general be observed, that in the case of manufactures prohibited to be worn, and in every case where a drawback, bounty, or premium is allowed on the exportation of any goods or manufactures, a bond is directed to be taken, with condition for the exporting of such goods or manufactures, and that the same shall not be relanded in any part of *Great Britain*. Where this is the case, besides all other penalties and forfeitures, the penalty of such bond is forfeited, if any part of such goods or manufactures be relanded.

#### 7. In divers other Cases.

By the 13 & 14 C. 2. c. 11. § 19. it is enacted, “ That if any  
 “ of the officers or persons appointed to manage the customs,  
 “ searchers, waiters, or other person or persons whatsoever, de-  
 “ puted and appointed by or under them, or any of them, or  
 “ any other authority whatsoever, and employed in or about the  
 “ affairs of the customs and subsidies, shall directly or indirectly  
 “ take

“ take or receive any bribe, recompence, or reward in any kind  
 “ whatsoever, to connive at any false entry of any goods or mer-  
 “ chandize whereby the king’s majesty, his heirs or successors,  
 “ shall be defrauded or hindered in or of his customs or subsidies,  
 “ or other sums of money, or goods prohibited to be exported or  
 “ imported, be suffered to pass by way of importation or exporta-  
 “ tion; the person or persons so offending shall forfeit the sum of  
 “ one hundred pounds, and be for ever afterwards incapable of  
 “ any office or employment under the king’s majesty, his heirs  
 “ and successors, or any authority derived from them; as also the  
 “ merchant, mariner, or other person or persons, who shall give  
 “ or pay any such bribe, recompence, or reward, shall forfeit the  
 “ sum of fifty pounds.”

By the 9 G. 2. c. 35. § 24. it is enacted, “ That if any per-  
 “ son or persons shall offer any bribe, recompence, or reward, to  
 “ any officer or officers of the customs, to connive at or permit  
 “ any customable or prohibited goods to be run on shore, or to  
 “ connive at any false or short entry of any such goods, or to do  
 “ any other act whereby his Majesty might be defrauded in his  
 “ revenue, every such person and persons shall for every such  
 “ offence, whether the same offer shall be accepted or not, forfeit  
 “ the sum of fifty pounds.”

[By the 24 G. 3. *sess.* 2. c. 47. § 32. if any officer of the navy, customs, or excise, shall make any collusive seizure, or deliver up, or agree to deliver up, or not to seize any vessel or goods liable to forfeiture, or shall take any bribe for non-performance of his duty, he shall for every offence forfeit 500*l.* and be rendered incapable of serving in any office civil or military; and if any person shall give, or promise to give, any bribe, or make any collusive agreement with any such officer, to connive at any act whereby any of the provisions relative to the customs or excise may be evaded, he shall for every such offence (whether such offer or agreement be accepted or performed or not) forfeit 500*l.*]

[Extended by 19 G. 3. c. 69. § 3. to all boats, &c. built to row with more than six oars, which shall be found either upon the land or water, in any port of Great Britain, or within two leagues of the coast; and by 24 G. 3. *sess.* 2. c. 47. § 25. to all boats, &c.]

By the 8 G. 1. c. 18. § 3. after reciting that many frauds are committed to the prejudice of the revenue, in the clandestine running of goods imported, and in the relanding of certificate goods, as well as in exporting wool and the coin of this kingdom, by watermen and others in boats, wherries, pinnaces, barges, and galleys, which are sometimes rowed with six, eight, or twelve oars, built on purpose for the smuggling trade, and in case of their being pursued by the officers do make their escape, which may also be a means of bringing in the infection, it is enacted, “ That if any  
 “ boat, wherry, pinnace, barge, or galley, rowing, or made or  
 “ built to row, with more than four oars, shall be found upon the  
 “ water, or in any bargehouse, workhouse, shed, or other place,  
 “ within any of the counties of *Middlesex, Surrey, Kent, or Essex,*  
 “ or in the river *Thames*, either above or below *London Bridge*, or  
 “ within the limits of the ports of *London, Sandwich, or Ipswich,*  
 “ or the members or creeks to them or either of them respect-  
 “ ively belonging, such boat, wherry, pinnace, barge, or galley,  
 “ with all her tackle and furniture, or the value thereof, shall be  
 “ forfeited,

“ forfeited, and shall and may be seized by any officer or officers exceeding  
 “ of the customs ; and the owner or owners thereof, or any per- 28 feet in  
 “ son using or rowing in any such boat, wherry, pinnace, barge, length from  
 “ or galley, shall also forfeit the sum of forty pounds.” the fore part  
 of the stern  
 to the aft

side of the stern-posts aloft, and the length of which shall be greater than in the proportion of three  
 feet and an half to one foot in breadth ; subject to the provisos in the former acts.]

But by § 4. it is provided, “ That this act shall not extend, or  
 “ be construed to extend, to any barge or galley belonging to, or  
 “ to belong to his Majesty or the royal family, or any of them, or  
 “ to any long-boat, yawl, or pinnace belonging to and used in  
 “ the service of any merchant ship or vessel, or to such boat,  
 “ wherry, pinnace, barge, or galley as shall be licensed by the  
 “ lord high admiral, or commissioners for executing the office of  
 “ lord high admiral, or the major part of the same commissioners  
 “ for the time being.”

By the 4 *W. & M. c.* 15. § 14. after reciting, that it is found  
 by experience, that great quantities of goods are daily imported  
 from foreign parts in a fraudulent and clandestine manner, with-  
 out paying the customs and duties due and payable to their Majes-  
 ties, and the same hath of late been much increased and promoted  
 by ill men, who, notwithstanding the laws already made, do un-  
 dertake, as insurers or otherwise, to deliver such goods so clandes-  
 tinely imported, at their charge and hazard, into the houses, ware-  
 houses, and possessions of the owners thereof, it is enacted, “ That  
 “ all and every person or persons, who, by way of insurance or  
 “ otherwise, shall undertake or agree to deliver any goods or mer-  
 “ chandizes, to be imported from parts beyond the seas, at any  
 “ port or place within this kingdom of *England*, dominion of  
 “ *Wales*, or town of *Berwick*, without paying the customs due  
 “ and payable for the same at such importation, or any prohi-  
 “ bited goods whatsoever, or, in pursuance of such agreement,  
 “ shall deliver, or cause or procure to be delivered, any prohibited  
 “ goods, or shall deliver, or cause or procure to be delivered, any  
 “ goods or merchandizes whatsoever, without paying such customs  
 “ and duties as aforesaid, knowing thereof, and all and every other  
 “ aiders, abettors, and assistants, shall for every such offence for-  
 “ feit the sum of five hundred pounds, over and above all other  
 “ forfeitures to which they are already liable by any act in  
 “ force.”

And by § 15. it is enacted, “ That all and every person or  
 “ persons, who shall agree to pay any sum or sums of money for  
 “ the insuring or conveying any goods or merchandizes that shall  
 “ be so imported, without paying the customs and duties due and  
 “ payable at the importation thereof, or of any prohibited goods  
 “ whatsoever, or shall receive or take such prohibited goods into  
 “ his or their house or warehouse, or other place on land, or such  
 “ other goods, before such customs or duties are paid, knowing  
 “ thereof, shall for every such offence forfeit the like sum of five  
 “ hundred pounds.”

By the 9 *G. 2. c.* 35. § 21. it is enacted, “ That all water-  
 “ men, carmen, porters, or other persons, employed in carrying  
 “ any

“ any goods, wares, or merchandizes prohibited, run, or clandestinely imported, upon whom or in whose custody the same shall be found or seized, knowing the same goods to be prohibited, or to have been clandestinely run or imported without payment of the customs, and who shall be thereof lawfully convicted upon his, her, or their appearance or default, upon the oath or oaths of one or more credible witness or witnesses, or by the confession of the party, before one or more justice or justices of the peace of the county, division, or liberty where such offence shall be committed, or the offender found, which oath such justice or justices are hereby required to administer, shall forfeit treble the value of all such goods.”

By the 8 G. 1. c. 18. § 10. it is enacted, “ That if any person or persons shall receive or buy any goods, wares, or merchandizes, clandestinely run or imported, before the same shall have been legally condemned, knowing the same to be so clandestinely run or imported, and shall be thereof lawfully convicted upon his, her, or their appearance or default, upon the oath or oaths of one or more credible witness or witnesses, or by the confession of the party, before one or more justice or justices of the peace of the county, division, or liberty where such offence shall be committed or the offender found, which oath such justice or justices of the peace are hereby required to administer, the person so convicted shall forfeit the sum of “ twenty pounds.”

By § 27. this clause was to have continuance for the space of two years, from the twenty-fifth day of *March* one thousand seven hundred and twenty-two, and from thence to the end of the then next session of parliament.

But it has been from time to time continued, and by the 28 G. 3. c. 23. was continued till the twenty-ninth day of *September* one thousand seven hundred and ninety-five, and from thence to the end of the then next session of parliament.

By 11 G. 1. c. 30. § 16. it is enacted, “ That if any person or persons shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any prohibited goods, or any run goods, wares, or merchandizes whatsoever, which are liable to any duty or duties of the customs, the party or parties offending therein, whether he, she, or they have or have not, or do or do not claim or pretend to have any property or interest in such goods, wares, or merchandize so harboured, kept, or concealed, shall for every such offence forfeit such goods, wares, and merchandizes, and treble the value thereof.”

By § 18 & 19. it is enacted, “ That if any person or persons shall offer or expose to sale any prohibited goods, wares, or merchandizes whatsoever, or any which actually have been, or shall by the party or parties offering or exposing the same to sale be pretended to have been run, all such goods, wares, and merchandizes, together with the package including and containing the same, shall be forfeited, and shall or may be seized by the “ party



“ party or parties to whom the same shall be so offered or exposed to sale; and the person or persons, so offering or exposing such prohibited or run goods, wares, and merchandizes to sale, shall forfeit the treble value thereof.”

By § 20 & 21. it is enacted, “ That all prohibited or run goods, wares, or merchandizes whatsoever, so or as such bought by any person or persons whatsoever, together with the package containing the same, shall be forfeited, and shall or may be seized and taken from the buyer or buyers thereof by the feller or fellers thereof; and the person or persons who shall buy any such prohibited or run goods, wares, or merchandizes, or which by the feller at the time of selling thereof shall be pretended to be either prohibited or run, shall forfeit treble the value thereof.”

But by § 21. it is declared, “ That it is not meant or intended by this act, that as well the party or parties buying, as also the party or parties selling or offering or exposing to sale such goods, wares, or merchandizes as aforesaid, shall, in any case or cases, both and each of them respectively forfeit, or be prosecuted, for the treble value of one and the same identical parcel or parcels of such goods, wares, or merchandizes; but that the party or parties, whether buyer or feller of, or offering or exposing to sale such goods, wares, or merchandizes, who with effect shall first prosecute the other of the said parties for the treble value of such goods, wares, and merchandizes, shall in every such case or cases be and is hereby declared, discharged, and acquitted of and from the like forfeiture, or being prosecuted for or on account of the treble value of such goods, wares, and merchandizes, for and on account whereof the other party or parties shall be prosecuted with effect.”

By the 8 *Annæ*, c. 7. § 17. it is enacted, “ That, besides the forfeiture of such goods, all persons, to whose hands any prohibited or uncustomed goods shall knowingly come after the unshipping thereof, shall forfeit treble the value thereof, together with all horses and other cattle and carriages made use of in the removing, carriage, or conveyance of any of the aforesaid goods.”

By the 8 *Annæ*, c. 13. § 16. it is enacted, “ That, besides the forfeiture of such certificate goods, every person or persons, to whose hands any certificate goods shall come knowingly after the unshipping thereof, shall forfeit double the amount of the drawback for such goods, together with all the horses or other cattle and carriages made use of in removing, carriage, or conveyance of the same.”

By the 9 *G. 2. c. 35.* § 30. it is enacted, “ That if any person or persons, who keep or shall keep any tavern, ale-house, victualling-house, or other house, where ale, wine, brandy, or other strong liquors shall be sold by retail, shall knowingly receive, harbour, or entertain any person or persons, against whom any *capias* or other process of arrest shall have issued, for having beat, abused, or obstructed any officer or officers of the customs  
“ in

“ in the execution of their office, or for any offence or offences  
 “ that are or shall be committed against any of the laws now in  
 “ being for preventing frauds in relation to the revenues of the  
 “ customs, or for any crime or crimes whatsoever that shall be  
 “ committed or done in prejudice of the said revenue, and to  
 “ which *capias* or other process, the sheriff, or other officer having  
 “ execution of the said process, shall have returned, that such  
 “ person or persons cannot be found, and which person or per-  
 “ sons shall not have appeared to the said process; or shall  
 “ knowingly harbour, receive, or entertain any person or per-  
 “ sons who, having been in prison for any of the said offences,  
 “ shall have escaped, or who shall have been convicted for the  
 “ same, and shall fly from justice, shall forfeit one hundred  
 “ pounds, and be rendered incapable of having a licence for  
 “ keeping any tavern, ale-house, or victualing-house, or selling  
 “ wine, ale, brandy, or other strong liquors by retail for the fu-  
 “ ture.”

But by § 31. it is provided, “ That no person shall suffer any  
 “ penalty or disability, for such receiving, harbouring, or enter-  
 “ taining, unless public notice shall have been given six days be-  
 “ fore, in two succeeding *Gazettes*, of the absconding of the per-  
 “ son or persons who shall be so received, harboured, or enter-  
 “ tained, and also by writing to be fixed to the door of the parish  
 “ church where such person or persons last dwelt before his ab-  
 “ sconding.”

By the 19 G. 2. c. 34. § 6. it is enacted, “ That if any officer  
 “ or officers of his Majesty’s revenue, or other person, being em-  
 “ ployed in the seizing, or conveying, or securing any wool or  
 “ goods forfeited on account of their being prohibited or uncu-  
 “ stomed goods, or in endeavouring to apprehend any offender  
 “ against this act, shall be beat, wounded, or maimed, or killed  
 “ by any offender against this act, or the said wool or other goods  
 “ shall be rescued, by persons armed as in this act is before men-  
 “ tioned, in all such cases respectively, the inhabitants of every rape  
 “ or lath, in such counties as are divided into rapes and laths, and  
 “ in every other county, the inhabitants of every hundred, where  
 “ such facts shall be committed, within that part of *Great Britain*  
 “ called *England*, shall make full satisfaction and amends for all  
 “ the damages which such officers or persons shall respectively  
 “ suffer by such beating, wounding, and maiming respectively, and  
 “ by the loss of such goods so seized and rescued; and shall also  
 “ pay the sum of one hundred pounds, for each person so killed,  
 “ to the executors or administrators of such officer or person so  
 “ killed as aforesaid; and that such respective officers and other  
 “ persons, and their said executors and administrators shall be, and  
 “ are hereby enabled to sue for and recover such their damages;  
 “ so as the sum to be recovered for such beating, wounding, or  
 “ maiming shall not exceed forty pounds, nor for the loss of the  
 “ goods two hundred pounds, against the inhabitants of the said  
 “ rape or lath, in such counties as are divided into rapes or  
 “ laths, and in every other county, the inhabitants of every hun-  
 “ dred,

“dred, who by this act shall be made liable to answer all or any part thereof.”

But by § 8. it is provided, “That where any offender shall be apprehended, and convicted of such offence within the space of six calendar months after the offence is committed, no hunter, rape, or lath, or any inhabitant thereof, shall be in anywise subject to make any satisfaction for such damages, or to pay the said one hundred pounds to the executors or administrators of such killed person.”

By 22 G. 2. c. 36. after reciting, that great quantities of foreign embroidery continued to be brought into and sold within this kingdom, the importation whereof is contrary to divers acts of parliament, it is enacted, “That, from and after the first day of July one thousand seven hundred and forty-nine, no foreign embroidery, or gold or silver brocade, shall be imported or brought into *Great Britain*, upon pain of being forfeited and burnt, and upon the further penalty of one hundred pounds, to be paid by the importer thereof, for each piece or parcel so imported.”

In a case reserved, in an action for the penalty of one hundred pounds for bringing in foreign embroidery, it was stated, that the defendant, whilst he was in *France*, had worn an embroidered waistcoat, which was made in *France*; and that this waistcoat was brought over in his portmanteau when he came to *England*. The question was, Whether he were liable to the penalty inflicted by the 22 G. 2.? It was holden, that he was not; and by Lord Mansfield, Ch. J. the intention of that statute was to prevent the bringing in of foreign embroidery for sale, and not to hinder a gentleman from bringing in his wearing apparel. If the defendant were liable in this case to the penalty, the waistcoat might have been seized in his portmanteau; and if it could have been seized in his portmanteau, it might have been taken off his back; the consequence of which would be, that any person, even a foreigner, coming from a foreign part, might be stripped naked, as soon as he sets his feet on the *British* shore.

MS. Rep.  
S3. Dyson  
qui tam v.  
Lord Villiers, East.  
13 G. 3. in  
K. B.

(G) Of the corporal Punishments to which Persons who have been guilty of Smuggling, or of such Practices as have a direct Tendency thereto, are liable,

#### 1. Imprisonment.

BY the 13 & 14 C. 2. c. 11. § 6. it is enacted, “That if any officer or officers of the customs shall be, by any person or persons armed with club or any manner of weapon, forcibly hindered, affronted, abused, beaten, or wounded, either on board any ship or vessel, or upon the land or water, in the due execution of their office, all and every person or persons so  
“resisting,

“ resisting, affronting, abusing, or wounding the said officer or  
 “ officers, or their deputies, or such as shall act in their aid or  
 “ assistance, shall by the next justice of peace, or other magistrate,  
 “ be committed to prison, there to remain till the next quarter-  
 “ sessions; and the justices of peace of the said quarter-sessions  
 “ are hereby empowered to punish the offender by fine, not  
 “ exceeding one hundred pounds, and the offender is to remain in  
 “ prison, till he be discharged by order of the Exchequer, both of  
 “ the fine and of the imprisonment, or discover the person that  
 “ set him on work, to the end that he may be legally proceeded  
 “ against.”

By § 8. it is enacted, “ That if any officer of any port, mem-  
 “ ber, or creek, shall grant or make any false certificate of any  
 “ goods or merchandizes which should have been landed out  
 “ of any ship or vessel, such officer shall suffer one year’s im-  
 “ prisonment without bail or mainprize, and be further liable to  
 “ such corporal punishment as the court of Exchequer shall think  
 “ fit.”

By the 5 G. 1. c. 11. § 7. it is enacted, “ That if any master,  
 “ purser, or other person taking charge of any ship or vessel, shall  
 “ permit or suffer any goods prohibited to be worn in this king-  
 “ dom, or any foreign goods shipped for parts beyond the seas to  
 “ be unshipped or landed, or the package of any such goods to  
 “ be opened or put into any other form, during the time the said  
 “ ship or vessel remain in port, without leave of one or more of  
 “ the principal officers of the port, such master, purser, or other  
 “ person shall, besides being subject to the forfeiture of one hun-  
 “ dred pounds, suffer six months imprisonment without bail or  
 “ mainprize.”

By 6 G. 1. c. 21. § 32. after reciting, that illegal importations  
 and exportations cannot be carried on by ships or vessels, if the  
 masters or commanders thereof do take due care to prevent the  
 same, it is enacted, “ That if the master, purser, or other person  
 “ taking charge of any ship or vessel, shall suffer any uncustomed  
 “ or prohibited goods to be put out of the said ship or vessel, into  
 “ any hoy, lighter, boat, or bottom, to be laid on land, or shall  
 “ suffer any wool, wool-fells, mortlings, shortlings, yarn made of  
 “ wool, wool-flocks, fuller’s-earth, fulling-clay, or tobacco-pipe-  
 “ clay, to be put on board such ship or vessel, to be carried to parts  
 “ beyond the seas, he or they so offending, being convicted  
 “ thereof, shall, besides the penalties and forfeitures to which  
 “ they will be liable by any law now in being, suffer six months  
 “ imprisonment without bail or mainprize.”

By the 8 G. 1. c. 18. § 10. after directing that any person or  
 persons, convicted of knowingly receiving or buying any run  
 goods before the same shall have been lawfully condemned, shall  
 be liable to a distress for the penalty of twenty pounds given by the  
 8 G. 1. c. 18. § 10. it is enacted, “ That, for want of such dis-  
 “ tress, every such offender shall be committed to prison, without  
 “ bail or mainprize, for the space of three months.”

2. Whipping.

## 2. Whipping.

By the 9 G. 2. c. 35. § 18. it is enacted, “ That upon information, to be given upon oath before one or more justices of the peace in any county, city, or liberty, that any person or persons are or shall be lurking, waiting, or loitering within five miles from the sea coast, or from any navigable river, and that there is reason to suspect, that they wait with intent to be aiding and assisting in the running, landing, or carrying away any prohibited or uncustomed goods, it shall and may be lawful for every such justice and justices to cause all such persons to come and be brought before him and them, and to grant his or their warrant or warrants for the apprehending such offender, and bringing him or them before any of the said justices of the peace; and if such persons shall not give a satisfactory account of themselves, and their callings and employments, or otherwise make it appear to the satisfaction of such justice or justices, that they are not to be employed or concerned in, or to be aiding or assisting in, the carrying on any fraudulent or clandestine trade, or unlawful business or occupation, and are not at such place as aforesaid, with intent to carry on the said clandestine practices, then every such person, who shall not give such account and satisfaction to such justice or justices, shall be committed to the house of correction, there to be whipt and kept to hard labour, for any time which such justice or justices shall in his or their discretion think meet, not exceeding one month.”

But by § 19. it is provided, “ That if any person or persons, so brought before such justice or justices, shall desire time for the making it appear, that he or they is or are not concerned in any of the said fraudulent or clandestine practices, such person or persons shall not be punished by whipping or other correction; but that then, and in every such case, it shall and may be lawful for every such justice and justices to commit such person and persons to the common gaol, there to remain and continue, until he or they shall give such account of him or themselves, or make proof of the matters aforesaid to the satisfaction of such justice or justices, or until such person or persons shall give and find good and sufficient security, to the approbation and satisfaction of the said justice or justices, not to be guilty of any of the said offences, or fraudulent, clandestine, or indirect practices.”

By § 21. after directing, that all watermen, carmen, porters, and other persons, convicted of carrying any goods or merchandizes, knowing the same to be prohibited or run, shall be liable to a distress, for the penalty of treble the value of such goods given by the 9 G. 2. c. 35. § 21. it is enacted, “ That for want of such distress, every such offender shall be committed to the house of correction, there to be whipt and kept to hard labour, for  
“ any

“ any time which the justice or justices of the peace committing  
 “ him or her shall in his or their discretion judge meet, not ex-  
 “ ceeding three months.”

### 3. Transportation.

By 6 G. 1. c. 21. § 34. after reciting, that the punishment already inflicted by law on such as shall forcibly obstruct officers of the customs in the due performance of their duty, has proved insufficient, it is enacted, “ That if any officer or officers of the  
 “ customs be forcibly hindered, wounded, or beaten, in the due  
 “ execution of their office, by any persons armed with club or  
 “ any manner of weapon, tumultuously assembled in the day or  
 “ night to the number of eight or more persons, all and every  
 “ person or persons so hindering, wounding, or beating the said  
 “ officer or officers, or such as shall act in their aid or assistance,  
 “ being convicted thereof, shall, by order of the court before  
 “ whom such offender or offenders shall be convicted, be trans-  
 “ ported to some of his Majesty’s colonies and plantations in  
 “ America, for such term as the court shall think fit, not exceed-  
 “ ing seven years, in the same manner as by an act made in the  
 “ fourth year of his present Majesty’s reign, intituled, *An act for the*  
 “ *further preventing robbery*, &c. the offenders therein mention-  
 “ ed are to be transported to the said colonies and plantations.”

By the 8 G. 1. c. 18. § 6. it is enacted, “ That all and every  
 “ person and persons, who shall be found passing knowingly and  
 “ willingly with any foreign goods or commodities, landed from  
 “ any ship or vessel, without the due entry and payment of the  
 “ duties by law charged thereon, in his, her, or their custody,  
 “ from any of the coasts of this kingdom, or within the space of  
 “ twenty miles of any of the said coasts, and shall be more than  
 “ five persons in company; or shall carry any offensive arms or  
 “ weapons; or wear any vizard, mask, or other disguise, when  
 “ passing with such goods or commodities as aforesaid; or shall  
 “ forcibly hinder or resist any officers of the customs in the  
 “ seizing or securing any forts or kinds of run goods or com-  
 “ modities, shall be deemed and taken to be runners of foreign  
 “ goods and commodities, within the meaning of this present  
 “ act; and being convicted of or for any of the said offences,  
 “ for which he, she, or they, so convicted, are by this present  
 “ act declared to be deemed and taken to be runners of foreign  
 “ goods and commodities, shall be adjudged guilty of felony, and  
 “ shall for such his, her, or their offence be transported as a felon  
 “ to some of his Majesty’s colonies or plantations in America, there  
 “ to remain for the space of seven years, in the same manner as  
 “ felons are appointed to be transported by an act made in the  
 “ fourth year of his Majesty’s reign, intituled, *An act for the fur-*  
 “ *ther preventing robbery*, &c. and by another act made in the  
 “ sixth year of his Majesty’s reign, intituled, *An act for the fur-*  
 “ *ther preventing robbery*, &c.”

By the 9 G. 2. c. 35. § 10. after reciting, that divers dissolute and disorderly persons frequently appear in great gangs near the sea-coasts, and the shores of navigable rivers, and in and about towns and villages adjacent thereto, and in divers other parts of this kingdom, carrying fire-arms and other offensive weapons, to the great terror of his Majesty's subjects, and the hindrance of the civil officers, and the officers of the customs and excise, in the execution and discharge of their duty, and during their abode there commit great spoil and devastation on the estates thereabouts, in order to be aiding and assisting in the clandestine running, landing, or carrying away prohibited and uncustomed goods, and to rescue the same, after seizure, from the officers of the customs and excise, and to watch for opportunities for that purpose; and that several officers of the revenue, and other their assistants, have been wounded, maimed, and some of them murdered in the execution of their office, and great quantities of run goods have been rescued after seizure, and sheriffs, and other chief officers have been forcibly hindered from the execution of process, it is enacted, "That, upon information to be given on oath, before any  
 " one or more of his Majesty's justices of the peace in any  
 " county, city, or liberty, that any persons to the number of three  
 " or more, are or have, after the 24th day of *June* in the year  
 " of our Lord one thousand seven hundred and thirty-six, been  
 " assembled for any of the purposes aforesaid, and are or have  
 " been armed with fire-arms or other offensive weapons, such  
 " justice or justices of the peace shall and may grant his or their  
 " warrant to the constables, headboroughs, and other peace officers, or any of them requiring such officer and officers, respectively, to take to his and their assistance as many of his Majesty's subjects as may be thought necessary, for the apprehending all and every person and persons against whom such  
 " information shall be given as aforesaid, and such justice or  
 " justices shall and may, if upon due examination he shall find  
 " cause, commit all and every or any of the said person and persons to the next county goal, there to remain without bail or  
 " mainprize, until he, she, or they shall be discharged by due  
 " course of law; and all and every such person and persons, upon  
 " due proof of his, her, or their being assembled and armed as  
 " aforesaid, in order to be aiding and assisting in the clandestine  
 " running, landing, or carrying away prohibited or uncustomed  
 " goods; and, upon conviction of and for such offence, shall be  
 " adjudged guilty of felony, and shall be transported as a felon,  
 " to some one of his Majesty's colonies or plantations in *America*,  
 " there to remain for seven years."

The defendant having been indicted upon this statute, it was found by a special verdict, that there were above three in company, and that all the others had fire-arms; but that the defendant had only a common horsewhip. Upon the first argument the court inclined strongly, that he was not guilty; for that the act makes the being armed a material circumstance in each man's case, and an act so penal is to be construed strictly. The court  
 did

Str. 1166.  
 The King  
 and Fletcher.

did not however determine the case upon the first argument ; but gave the Attorney General time to consider of it. He, after conference with the Solicitor General, declined to argue it a second time, and the prisoner was discharged.

By 9 G. 2. c. 35. § 28. after reciting, that the punishment to which such persons as shall forcibly obstruct or hinder any officer of the customs, being on board any ship, boat, or vessel within the limits of any port of this kingdom, are liable by law, hath proved insufficient, it is enacted, " That if any officer or officers of the customs, being on board any ship, boat, or vessel within the limits of any of the ports of this kingdom, shall be forcibly hindered, opposed, obstructed, wounded, or beaten, in the due execution of his or their office or duty, by any person or persons whatsoever, either in the day or night, all and every person and persons so forcibly hindering, opposing, obstructing, wounding, or beating the said officer or officers in the execution of his or their office, and all such as shall act in their aid or assistance, being convicted thereof, shall, by order of the court before whom such offender or offenders shall be convicted, be transported to some one of his Majesty's colonies or plantations in *America* for such term as such court shall think fit, not exceeding seven years."

[See further for obstructing officers in the execution of their duty, *ft.* 24 G. 3. *sess.* 2. c. 47. § 15, 16. and 34 G. 3. c. 50. § 5.]

[See a similar provision in 24 G. 3. *sess.* 2. c. 47. § 13.]

By the 19 G. 2. c. 34. § 3. it is enacted, " That all and every person and persons who shall, after the time appointed for the surrender of any person or persons charged upon oath with any of the offences before mentioned in this act shall be expired, harbour, receive, conceal, aid, abet, or succour such person or persons, knowing him to have been so charged, and to have been required to surrender him or themselves, by such order or orders as are thereby directed to be made, and not to have surrendered him or themselves pursuant to such order or orders, being prosecuted for the same within one year after the offence committed, and lawfully convicted thereof, shall be guilty of felony, and shall be transported as a felon or felons to some one of his Majesty's colonies or plantations in *America*, there to remain for the space of seven years."

#### 4. Death.

By the 19 G. 2. c. 34. § 1. after reciting, that divers dissolute persons have associated themselves, and entered into confederacies to support one another, and have appeared in great gangs in divers parts of the kingdom, carrying fire-arms or other offensive weapons, and when so assembled have been aiding and assisting in running, landing, or carrying away prohibited or uncustomed goods, or goods liable to duties of excise ; or in the illegal relanding of goods or merchandizes, which have been shipped or exported upon debenture or certificate ; or in rescuing the same after seizure ; or in obstructing the officers of the revenue in the execution of their office, to the great discouragement of the fair trader,



trader and the loss of the public revenue; and that several officers of the revenue and their assistants have been wounded, maimed, and some of them killed, when in the execution of their office or otherwise, by the said dissolute persons so associated and assembled as aforesaid, to the great terror of his Majesty's peaceable subjects, in defiance of the laws, and to the utter subversion of all civil authority and power whatsoever, it is enacted, "That if any persons, to the number of three or more, shall, from and after the twenty-fourth day of *July* in the year of our Lord one thousand seven hundred and forty-six, be assembled, in order to be aiding and assisting in the illegal exportation of wool, or other goods prohibited to be exported; or in the carrying of wool, or other such goods, in order to such exportation; or in the running, landing, or carrying away prohibited or uncustomed goods, or goods liable to pay any duties which have not been paid or secured; or in the illegal relanding of any goods whatsoever, which have been shipped or exported upon debenture or certificate; or in rescuing or taking away the same, after seizure, from any officer or officers of the customs or excise or other his Majesty's revenue, or other person or persons employed by him or them, or assisting him or them, or from the place where they shall be lodged by him or them; or in rescuing any person, who shall be apprehended for any of the offences made felony by this or any other act relating to the revenues of the customs or excise; or in preventing the apprehending of any person who shall be guilty of any such offence; and in case any persons to the number of three or more, so armed as aforesaid, shall, after the said twenty-fourth day of *July*, be so aiding or assisting; or if any person shall, after the said twenty-fourth day of *July*, have his face blacked, or wear any vizard, mask, or other disguise, when passing with such goods; or shall forcibly hinder, obstruct, assault, oppose, or resist any of the officers of the customs or excise, or any other his Majesty's revenue, in the seizing and securing any such goods; or if any person or persons, after the said twenty-fourth day of *July*, shall maim or dangerously wound any officer of the customs or excise, or any other his Majesty's revenue, in his attempting to go on board any ship or vessel, within the limits of any of the ports of this kingdom; or shall shoot at, maim, or dangerously wound him when on board such ship or vessel, and in the due execution of his office or duty, then every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy."

By § 2. for the more easy and speedy bringing the offenders against this statute to justice, it is enacted, "That if any person or persons shall be charged with being guilty of any of the offences aforesaid, before any one or more of his Majesty's justices of peace, or before one of the justices of his Majesty's court of King's Bench, if the offence be committed in *England*, or before the Lord Justice General, or one of the Lords of Justiciary, or any one or more of his Majesty's justices of

" peace in *Scotland*, if the offence be committed in *Scot-*  
 " land, by information of one or more credible person or  
 " persons upon oath, by him or them to be subscribed, such  
 " justice of the peace, or justice of the King's Bench, or Lord  
 " Justice General, or Lord Justice Clerk, or Lord of Justiciary  
 " respectively, before whom such information shall be made as  
 " aforesaid, shall forthwith certify under his hand and seal, and  
 " return such information to one of the principal secretaries of  
 " state of his Majesty, his heirs or successors, who is hereby  
 " required to lay the same, as soon as conveniently can be, before  
 " his Majesty, his heirs or successors, in his or their privy coun-  
 " cil; whereupon it shall and may be lawful for his Majesty, his  
 " heirs or successors, to make his or their order in his or their  
 " said privy council, thereby requiring and commanding such  
 " offender or offenders to surrender him or themselves, within the  
 " space of forty days after the publication thereof in the *London*  
 " *Gazette*, to the Lord Chief Justice, or any other of his Majesty's  
 " justices of the court of King's Bench, or to any one of his Majesty's  
 " justices of the peace, if the offence be committed in *England*;  
 " or to any of the Lords of Justiciary, or to any of his Majesty's  
 " justices of the peace in *Scotland*, if the offence be committed  
 " in *Scotland*; who is hereby required, upon such offender or  
 " offenders surrendering him or themselves, to commit him or  
 " them without bail or mainprize to the county gaol, or to the  
 " gaol or prison of the place where he or they shall so surrender,  
 " to the end that he or they may be forthcoming to answer the  
 " offence or offences wherewith he or they shall stand charged  
 " according to due course of law; which order the clerks of his  
 " Majesty's privy council shall cause to be forthwith printed and  
 " published in the two successive *London Gazettes*, and to be forth-  
 " with transmitted to the sheriff of the county where the offence  
 " shall be committed, who shall, within fourteen days after the  
 " receipt thereof, cause the same to be proclaimed, between the  
 " hours of ten in the morning and two in the afternoon, in the  
 " market places, upon the respective market days, of two market  
 " towns in the same county, near to the place where such offence  
 " shall have been committed; and a true copy of such order shall  
 " be affixed upon some public place in such market towns; and  
 " in case such offender or offenders shall not surrender him or  
 " themselves, pursuant to such order of his Majesty, his heirs  
 " or successors, to be made in council as aforesaid, he or they so  
 " neglecting or refusing to surrender him or themselves as afore-  
 " said, or escaping after such surrender, shall, from the day ap-  
 " pointed for his or their surrender as aforesaid, be adjudged,  
 " deemed, and taken to be convicted and attainted of felony, and  
 " shall suffer pains of death, as in cases of a person convicted and  
 " attainted by verdict and judgment of felony, without benefit of  
 " clergy; and it shall be lawful to and for the court of King's  
 " Bench, or the justices of oyer and terminer or general gaol  
 " delivery, for the county or place where such person shall be, to  
 " award execution against such offender and offenders, in such  
 " manner, as if he or they had been convicted and attainted in  
 " the

“ the said court of King’s Bench, or before such justices of oyer and terminer or general gaol delivery respectively.”

By § 17. this statute was to have continuance for the space of seven years, and from thence to the end of the then next session of parliament.

But so much thereof, as relates to the further punishment of persons going armed or disguised in defiance of the laws of the customs and excise, has been from time to time continued, and is by the 4 G. 3. c. 12. further continued to the twenty-ninth day of September one thousand seven hundred and seventy-one, and from thence to the end of the then next session of parliament.

[A similar provision is now inserted in 24 G. 3. sess. 2. c. 47. § 12.]

*Harvey*, who had been committed for not surrendering himself pursuant to the directions of this statute, being brought into the court of King’s Bench by a *habeas corpus*, it was agreed by the court, that a suggestion containing all the facts should be entered upon the roll: and by *Lee*, Ch. J.—It is necessary, that all the facts should in this case appear to the court upon record; it not being like the case of an attainder by act of parliament, in which the facts are settled, the person named, and the only question is, Whether the prisoner be the identical person attainted? In a suggestion entered by the Attorney General, it was among other facts to bring the prisoner within this statute averred, that he had been guilty of an offence, provided against by this statute, at *Benacre* in the county of *Suffolk*; and that the sheriff did, within fourteen days after the receipt of the order of council, cause the same to be proclaimed, between the hours of ten in the morning and two in the afternoon, in the respective market places, upon the respective market days, of two market towns, but neither of them was named in the suggestion, in the county of *Suffolk*, the said two market towns being near to the place where the offence was committed. *Ford*, of counsel for the prisoner, objected to the two market towns not being named in the suggestion; but it being ruled, that, if the prisoner had any objection to the suggestion, he must demur to it; he gave up this objection, and prayed time to plead till next term. As to this the opinion of the court was—That the prisoner ought to plead *in instant*, as is done in indictments; and by *Foster*, J.—If this court should give a term to plead in, it will be expected that justices of gaol delivery, to whom the same power is given by this statute as is given to this court, should give time to plead till the next assize. Hereupon the prisoner denied all the facts he was charged with; and the Attorney General affirmed them, joined issue, and prayed that a *venire* might be awarded. *Ford* desired to have a copy of the suggestion; but the court, who told him he might hear it read again, refused to grant this. A *venire* was awarded, and it was agreed by the court, that the proceedings should be in the same manner as before justices of gaol delivery. In the next term the prisoner was brought to the bar; and a jury was sworn well and truly to try the several issues joined between our sovereign lord the king and *John Harvey*, and a true verdict to give according to the evidence. After divers of the facts had been proved, the

MS. Rep.  
Rex v. Harvey, Easter 20 G. 2. in K. B.  
[Fost. Cr. L. 51. S. C. 1 Willf. 164. S. C.]

under-sheriff of *Suffolk* proved the proclaiming of the order of council at *Ipswich*, a market town where the prisoner was accustomed to come frequently; but he said, that there were eight other market towns nearer to *Benacre* than *Ipswich*. It was likewise proved, that the order was proclaimed at *Leosloff*, a market town within five miles of *Benacre*, and at *Hadley*, another market town in which the prisoner lived. To this evidence *Ford* demurred; and for cause said, that this was not a proclamation within the meaning of the statute, which directs, that the proclamation shall be made in two market towns near the place where the offence was committed, whereas *Hadley* is forty-two miles distant from thence, and *Ipswich* thirty-three: and it appears from the evidence of the under-sheriff, that there are several market towns much nearer to *Benacre*. The counsel for the crown answered, that the word *near* is in this, as in many other acts of parliament, merely directory; that the intention of the statute is nothing more than that the proclamation should, at the discretion of the sheriff, be made where the party is most likely to hear of it; and that this intention has in the present case been fully answered. If the legislature had intended a place than which none is nearer, they would not have made use of the word *near*, but of the word *next*; which might for several reasons have been inconvenient, and seems to have been avoided with design. He insisted further, that this is a matter of fact, of which the jury are the proper judges. *Ford* in reply said, that although the word *near* was not intended to mean the same thing as the word *next*, it by no means follows, that market towns at the distance of forty miles can be said to be near; and especially, if as in this case there are eight market towns nearer; and that this is not a matter proper to be left to the jury. *Lee*, Ch. J.—If this man had been guilty of an offence against this statute, he was not under a necessity of surrendering himself upon these proclamations. *Wright*, J.—All the directions in this statute are very express, and nothing is left to discretion. It would be of very dangerous consequence to leave matters of this sort to the discretion of a sheriff, and then to inquire whether he has acted properly. *Dennison*, J.—No rule of law is more certain, than that in capital cases the words of an act of parliament must be strictly complied with. In the case of the *King v. Fletcher*, a smuggler, before smuggling was made a capital offence, it was holden, that a statute which creates a new felony, must always be construed literally and strictly. I agree, that this statute does not intend to fix the making of the proclamations at the very next market towns; but it plainly intends, that they should be made near the place where the offence was committed, and not at the distance of thirty or forty miles. *Fester*, J.—The under-sheriff seems to have acted uprightly, and with a good intention: but the statute has not in fact been complied with; for, although the word *near* does not import the same rigid exactness as the word *next*, it certainly excludes the distance of thirty or forty miles, when there are so many market towns much nearer. The jury were directed by the court to find all the

issues

issues for the crown, except that in which it is averred, that the proclamations were made in two market towns near the place where the offence was committed, and to find that issue for the defendant.

[By 24 G. 3. *sess.* 2. c. 47. § 11. if any person upon the shore, or on board any vessel, shall maliciously shoot at any vessel, &c. belonging to the navy, or in the service of the customs or excise, within the limits of any port, harbour, or creek of *Great Britain*, or within four leagues of the coast; or shall maliciously shoot at or wound any officer of the navy, customs, or excise, acting in the due execution of his duty, or any person assisting such officer, every person so offending or aiding therein shall suffer death as a felon.]

## Sodomy.

**SODOMY**, so called from the prevalence of this crime in the city of *Sodom*, is an unnatural copulation between two human creatures, or between a human and a brute creature.

The word *buggery*, by which name this offence is likewise known, is derived from the *Italian* word *bugeraire*, which signifies to pierce a hole through.

If any crime deserve to be punished in a more exemplary manner this does. Other crimes are prejudicial to society; but this strikes at the being thereof: it being seldom known that a person, who has been guilty of abusing his generative faculties so unnaturally, has afterwards a proper regard for women.

From that indifference to women, so remarkable in men of this depraved appetite, it may fairly be concluded, that they are cursed with insensibility to the most extatick pleasure which human nature is in the present state capable of enjoying.

It seems a very just punishment, that such wretches should be deprived of all taste for an enjoyment upon which they did not set a proper value; and the continuation of an impious disposition, which might have been transmitted to their children, if they had had any, may be thereby prevented.

By the *Levitical* law, not only the man or woman guilty of bestiality was to suffer death, but the beast was likewise to be put to death. This is said to have been ordained, not because the beast had offended; but for the following reasons—That the like foul passion might not be excited in another person, by the sight of the beast; that the beast might not, by remaining alive, keep up the remembrance of the wretch who had suffered; and, that the beast might not, as sometimes happens, bring forth a monster.

Puff. Law of  
Nature and  
Nations,  
b. 2. c. 3. l. 3.

monster, the sight of which would be offensive and hateful to all good men. A fourth reason is added in a note upon the passage; namely, that the Divine Author of the Levitical law, to make mankind sensible how detestable this crime is in his eyes, would have every creature put to death which had contributed to the commission thereof.

3 Inst. 39. It is laid down by *Coke*, Ch. J. that the least degree of penetration maketh a carnal knowledge.

1 Hawk. Pl. C. 6. It is said that, as every indictment for sodomy must contain the words, *rem veneram habuit et carnaliter cognovit*, some kind of penetration, and also of emission, must be proved; and that emission is *prima facie* evidence of penetration.

It must be allowed, that penetration may be without emission; and it is easy to conceive that it would in some cases be difficult to prove emission where it has in fact been. It seems then a little strange, to make the proof of emission necessary to the proof of sodomy.

3 Inst. 59. It is indeed said in one of the books cited by Mr. Serjeant *Hawkins*, that emission is an evidence of buggery: but it is not said, that the proof of emission is necessary upon an indictment for buggery.

1 H. H. P. C. 628. *Hale*, Ch. J. goes further; his opinion being, that proof of emission is not necessary upon an indictment for buggery.

3 Inst. 59. The patient in this offence, as well as the agent, is guilty of felony; unless he be under fourteen years of age.

3 Inst. 59. Although this offence can be committed by only two persons; yet if any other person be present, abetting and aiding, he is a principal.

It appears from divers authors, that in ancient times the punishment of this offence was death; but they differ as to the mode of inflicting it.

Britt. lib. 6. c. 9. According to *Britton*, a sodomite was to be burnt.

Flet. lib. 6. c. 35. In *Fleta* it is said, *peccantes et sodomitæ in terra vivi confodiantur*.

Mirr. c. 4. f. 14. With the latter agrees the *Mirror*; and it is added, *issint que memoire sont refraine, pur le grand abomination del fait*.

3 Inst. 58. About the time of *Richard* the First, the practice was to hang a man, and drown a woman, guilty of this offence.

The practice of punishing this offence with death had, for some time before the making of the statute of the 25 H. 8. c. 6. been discontinued.

By this statute, after reciting, that there is not yet a sufficient punishment appointed, for the detestable and abominable vice of buggery with mankind, or beast, it is enacted, "That the same offence be from henceforth adjudged felony; and that the offender, being thereof convicted, shall suffer such pains of death as felons are accustomed to do according to the order of the common law of this realm; and that no person, offending in any such offence, shall be admitted to his clergy."

This

This statute was repealed by the 1 Mar. c. 1. but it was revived, and made perpetual, by the Eliz. c. 17.

A man was found guilty of having committed buggery upon a girl eleven years of age, and had received sentence of death: but the judge before whom he was tried, reprieved him, in order to obtain the opinion of the judges, whether this was a case within the statute. It was said, that no opinion was given; because the judges were not unanimous: but *Fortescue Aland*, J. who reports the case, affirms, that a great majority of them were of opinion, that this is a buggery by the law of *England*. He adds, that the Earl of *Macclesfield*, then Chancellour, to whom he wrote upon the occasion, was clearly of opinion, that this case is not only within the reason, but also within the words of the statute; and that he was surpris'd there should have been any difference of opinion among the judges. The reporter moreover cites several authorities to shew, that, under the word "mankind," which is a word used in the statute, all females as well as males of the human species are comprehended.

Fortescue. 91  
Rex v.  
Wifeman.

## Soldiers.

**A** SOLDIER, so called from the *German* word *fold* or *fould*, which signifies a stipend, is a man hired for pay to serve in war.

The ancient method of raising soldiers was in this manner:—  
A knight or an esquire, who had revenues, farmers, and tenants, covenanted with the king, by indenture enrolled in the Exchequer, to serve him in war for a certain term, with a certain number of men, whose names were set down in a list.

There are divers regulations concerning soldiers in some ancient statutes; but as these were adapted to the ancient method of raising soldiers, which has for many years been discontinued, it is not necessary to give an account of such regulations.

18 H. 6.  
c. 18, 19.  
7 H. 7. c. 1.  
3 H. 8. c. 5.  
2 & 3 E. 6.  
c. 2. 4 & 5 P. & M. c. 3.

The regulations as to soldiers, at this time observed, depend upon some modern acts of parliament, and principally, upon one which is passed annually, intituled, *An act for punishing mutiny and desertion, and for the better payment of the army and their quarters.*

Such of these regulations as are of more general use to be known, shall be treated of in the following order:

(A) Of enlisting Soldiers.

(B) In what Cases Soldiers are free from Arrest.

Y 4

(C) Of

- (C) Of quartering Soldiers.
- (D) Of Carriages for the Use of His Majesty's Forces.
- (E) Of the Penalties incurred by encouraging Desertion or harbouring a Deserter, and of the Reward for apprehending a Deserter.
- (F) Of the Military Punishments to which Soldiers are liable.
- (G) Of the Civil Punishments to which Soldiers are liable.
- (H) Of the Liberty given to Soldiers of exercising Trades.
- (I) Of divers Things, which did not fall under any of the foregoing Heads.

#### (A) Of enlisting Soldiers.

[This clause is copied into every mutiny act.]

BY the 36 G. 3. c. 3. § 71. it is enacted, " That when and as  
 " often as any person or persons shall be enlisted as a soldier  
 " or soldiers in his Majesty's land service, he and they shall within  
 " four days, but not sooner than twenty-four hours, after such  
 " enlisting respectively, be carried before the next justice of the  
 " peace of any county, riding, city, or place, or chief magistrate  
 " of any city or town corporate, not being an officer of the army,  
 " and before such justice or chief magistrate he or they shall be  
 " at liberty to declare his or their dissent to such enlisting; and  
 " upon such declaration and returning the enlisting money, and  
 " also each person so dissenting paying the sum of twenty shil-  
 " lings for the charges expended or laid out upon him, such per-  
 " son or persons so enlisted shall be forthwith discharged and set  
 " at liberty in the presence of such justice or chief magistrate;  
 " but if such person or persons shall refuse or neglect, within  
 " the space of twenty-four hours, to return and pay such moneys  
 " as aforesaid, he or they shall be deemed and taken to be enlisted,  
 " as if he or they had given his or their assent thereto before  
 " such justice or chief magistrate; or if such person or persons  
 " shall declare his or their having voluntarily enlisted himself or  
 " themselves, then such justice or chief magistrate shall and he  
 " is hereby required forthwith to certify under his hand, that such  
 " person or persons is or are duly enlisted, setting forth the place  
 " of the birth, age, and calling of him or them respectively, if  
 " known, and that the second and sixth sections of the articles of  
 " war against mutiny and desertion were read to him or them,  
 " and that he or they had taken the oath mentioned in the said  
 " articles of war; and if any such person or persons, so to be  
 " certified as duly enlisted, shall refuse to take the said oath of  
 " fidelity



“ fidelity before the said justice or chief magistrate, it shall and  
 “ may be lawful for such officer from whom he has received such  
 “ money as aforesaid, to detain and confine such person or per-  
 “ sons until he or they shall take the oath before required; and  
 “ every military officer that shall act contrary hereto, or offend  
 “ herein, shall incur the like penalty and forfeiture, as is by this  
 “ act to be inflicted upon any officer for making a false and untrue  
 “ muster.”

The second section of the articles of war, which is to be read to  
 “ an enlisted man, contains the following articles :

*Art. 1.* “ Whatsoever officer or soldier shall presume to use  
 “ traiterous or disrespectful words against the sacred person of  
 “ his Majesty, his Royal Highness the Prince of *Wales*, or any of  
 “ the royal family; if a commissioned officer, he shall be cashiered;  
 “ if a non-commissioned officer or soldier, he shall suffer such  
 “ punishment as shall be inflicted upon him by the sentence of a  
 “ court-martial.”

*Art. 2.* “ Any officer or soldier who shall behave himself with  
 “ contempt or disrespect towards the general or other commander  
 “ in chief of our forces, or shall speak words tending to his hurt  
 “ or dishonour, shall be punished according to the nature of his  
 “ offence by the judgment of a court-martial.”

*Art. 3.* “ Any officer or soldier who shall begin, excite, cause,  
 “ or join in any mutiny or desertion in the troop, company, or  
 “ regiment to which he belongs, or in any other troop or com-  
 “ pany in our service, or on any party, post, detachment, or  
 “ guard, on any pretence whatsoever, shall suffer death, or such  
 “ other punishment as by a court-martial shall be inflicted.”

*Art. 4.* “ Any officer, non-commissioned officer, or soldier,  
 “ who, being present at any mutiny or sedition, does not use his  
 “ utmost endeavours to suppress the same, or coming to the know-  
 “ ledge of any mutiny, or intended mutiny, does not without  
 “ delay give information thereof to his commanding officer, shall  
 “ be punished by a court-martial with death or otherwise accord-  
 “ ing to the nature of his offence.”

*Art. 5.* “ Any officer or soldier, who shall strike his superior  
 “ officer, or offer to draw or shall lift up any weapon, or offer any  
 “ violence against him being in the execution of his office, on  
 “ any pretence whatsoever, or shall disobey any lawful command  
 “ of his superior officer, shall suffer death, or such other punish-  
 “ ment as shall according to the nature of his offence be inflicted  
 “ upon him by the sentence of a court-martial.”

The sixth section of the articles of war, which is likewise to be  
 read to an enlisted man, contains the following articles :

*Art. 1.* “ All officers and soldiers who, having received pay or  
 “ having been duly enlisted in our service, shall be convicted of  
 “ having deserted the same, shall suffer death or such other  
 “ punishment as by a court-martial shall be inflicted.”

*Art. 2.* “ Any non-commissioned officer or soldier, who  
 “ shall without leave of his commanding officer absent him-  
 “ self from his troop or company, or from any detachment with  
 “ which

“ which he shall be commanded, shall, upon being convicted thereof, be punished according to the nature of his offence at the discretion of a court-martial.”

*Art. 3.* “ No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on the penalty of being reputed a deserter and suffering accordingly: and in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not after his being discovered to be a deserter immediately confine him, and give notice thereof to the corps in which he last served, he the said officer so offending shall by a court-martial be cashiered.”

*Art. 4.* “ Whatsoever officer or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert our service, shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.”

The oath which is to be administered to an enlisted man is in these words: “ I swear to be true to our sovereign King *George*, and to serve him honestly and faithfully, in defence of his person, crown, and dignity, against all his enemies and opposers whatsoever: and to observe and obey his Majesty’s orders, and the orders of the generals and officers set over me by his Majesty.”

By the 36 G. 3. c. 3. § 72. it is enacted, “ That if any person or persons shall receive the enlisting money from any officer, knowing it to be such, and shall abscond or refuse to go before such justice or chief magistrate, in order to declare his assent or dissent as aforesaid, such person or persons shall be deemed and taken to be enlisted to all intents and purposes whatsoever; and shall and may be proceeded against, as if he or they had taken the oath, directed by the said articles of war to be taken, before such justice or chief magistrate.”

*Parker*, an apprentice, who had enlisted without the consent of his master, being brought up by a *habeas corpus* to the court of King’s Bench, was discharged.

By the 36 G. 3. c. 28. intituled, *An act for the regulation of his Majesty’s marine forces while on shore*, the same provisions are made as to the enlisting of men to serve as marines, as in the paragraph just cited are made for the enlisting of men to serve as soldiers; and it may once for all be observed, that the same regulations, as to their being free from arrests, their quarters, their being subject to military punishments, and many other things, are made by this statute for marines, as are made by the mutiny act for soldiers.

[In all cases of actual invasion, or upon imminent danger, and in all cases of rebellion or insurrection, his Majesty is empowered (the occasion being first communicated to parliament, if the parliament be then sitting, or declared in council, and notified by proclamation, if no parliament be then sitting or in being) to order the lieutenants, or in case of the death or absence of any of them,

MS. Rep.  
Rex and  
Parker,  
Easter  
31 G. 2.

26 G. 3.  
c. 107. § 95.

them, any three or more of the deputy-lieutenants, with all convenient speed to draw out and embody the militia within their respective counties, or such part of them as his Majesty may judge necessary, and in such manner as shall be best adapted to the circumstances of the danger, and to put such forces under the direction of such general officers as his Majesty may be pleased to appoint, to be led by their respective officers into any parts of the kingdom, for the repelling of the invasion, or suppressing the rebellion; and during such time as the militia shall be so drawn out and embodied, they shall be subject to all the provisions contained in any act of parliament which shall be then in force for punishing mutiny and desertion, and for the better payment of the army and their quarters.]

### (B) In what Cases Soldiers are free from Arrest.

BY the 36 G. 3. c. 3. § 65. in order to prevent, as far as may be, any unjust or fraudulent arrests that may be made upon soldiers, whereby his Majesty and the publick may be deprived of their service, it is enacted, " That no person whatsoever, who is  
 " or shall be listed, or shall list or enter himself as a volunteer  
 " in his Majesty's service, as a soldier, shall be liable to be taken  
 " out of his Majesty's service by any process or execution whatsoever, other than for some criminal matter, unless for a real  
 " debt or other just cause of action, and unless before the taking  
 " out of such process or execution, not being for a criminal matter, the plaintiff or plaintiffs therein, or some other person or  
 " persons on his or their behalf, shall make affidavit before one  
 " or more judge or judges of the court of record, or other court  
 " out of which such process or execution shall issue, or before  
 " some person authorized to take affidavits in such court, that to  
 " his or their knowledge the original sum, justly due and owing  
 " to the plaintiff or plaintiffs from the defendant or defendants in  
 " the action or cause of action on which process shall issue, or  
 " that the original debt for which such execution shall be issued  
 " out, amounts to the value of twenty pounds at least, over and  
 " above all costs of suit in the same action, or in any other action  
 " on which the same shall be grounded; a memorandum of  
 " which oath shall be marked on the back of such process or writ,  
 " for which memorandum or oath no fee shall be taken. And if  
 " any person shall nevertheless be arrested contrary to the intent  
 " of this act, it shall and may be lawful for one or more judge or  
 " judges of such court, upon complaint thereof made by the party  
 " himself, or by any his superior officer, to examine into the same  
 " by oath of the parties or otherwise, and by warrant under his  
 " or their hands and seals to discharge such soldier so arrested  
 " contrary to the intent of this act, without paying any fee or  
 " fees, upon due proof made before him or them that such soldier  
 " so arrested was legally listed as a soldier in his Majesty's service,  
 " and arrested contrary to the intent of this act, and also to  
 " award

“award to the party so complaining such costs as such judge or  
 “judges shall think reasonable: for the recovery whereof he shall  
 “have the like remedy that the person who takes out the said  
 “execution might have had for his costs, or the plaintiff in the  
 “like action might have had for the recovery of his costs, in case  
 “judgment had been given for him with costs against the defend-  
 “ant in the said action.”

But by § 67, to the end that honest creditors, who aim only at the recovery of just debts, due to them from persons entered into and listed in his Majesty's service, may not be hindered from suing for the same, but on the contrary may be assisted and forwarded in their suits; and instead of an arrest, which may at once hurt the service and occasion a great expence and delay to themselves, may be enabled to proceed in a more easy and cheap method, it is enacted, “That it shall and may be lawful to or for any plain-  
 “tiff or plaintiffs, upon notice first given in writing of the cause  
 “of action to such person or persons so entered, or left at his or  
 “their last place of residence before such listing, to file a com-  
 “mon appearance, in any action to be brought for or upon ac-  
 “count of any debt whatsoever, so as to entitle such plaintiff to  
 “proceed therein to judgment or outlawry, and to have an exe-  
 “cution thereupon, other than against the body or bodies of him  
 “or them so listed as aforesaid; this act, or any thing herein, or  
 “any former law or statute, to the contrary notwithstanding.”

[This act is  
 now ex-  
 pired.]

The exemption from being arrested, except for a criminal mat-  
 ter or a debt of ten pounds, extended formerly only to volunteers.  
 But by the 30 G. 2. c. 8. § 20. it is enacted, “That the com-  
 “missioners, present at a meeting for listing soldiers as in this act  
 “is before directed, shall cause the second and sixth sections of  
 “the articles of war against mutiny and desertion to be read to  
 “the men impressed by virtue of this act, and from and after the  
 “reading the said articles of war, every man so impressed shall  
 “be deemed a listed soldier to all intents and purposes, and shall  
 “not be liable to be taken out of his Majesty's service by any  
 “process, other than for some criminal matter.”

Ld. Raym.  
 1246.  
 Sheriff of  
 Middlesex's  
 case.

To a *latitat* issued to arrest a man the sheriff returned, that he was listed according to the act of the 4 & 5 Anne, c. 10. *et ea occasione capere non possum*. It was insisted, that the sheriff ought to have arrested the defendant, and that he might afterwards have been discharged by a judge on common bail, if he were regularly listed, but that the sheriff was not to take upon himself to determine as to the regularity of the enlisting. The court upon consideration held the return to be good, and that, as the statute operated as a *superfedeas* to any process to be issued against a person enlisted, the sheriff if he should arrest such person would be liable to an action of false imprisonment. It appears from the clause, by which the plaintiff is enabled to file common bail and to proceed to judgment against the defendant, that it is not the intention of the statute, that a soldier should be liable to be arrested and be afterwards discharged on common bail. If this

man were not regularly listed, the plaintiff has his remedy by action against the sheriff for a false return.

A soldier being in custody upon a writ *de excommunicato capiendo*, for non-payment of costs in a suit for tithes in a court christian, he was ordered by the court of King's Bench to be discharged, as being within the reason of the mutiny act.

As the words heretofore in the mutiny act were, *that any person, who voluntarily lifts himself, shall not be taken out of his Majesty's service by any process whatsoever*, it was holden by the court of King's Bench, that only mesne process was intended, and that a soldier might be taken in execution. It appears however from what fell from *Holt*, Ch. J. that the court of Common Pleas had at that time been of a contrary opinion.

the defendants enlisted themselves for the mere purpose of protection; the one after judgment, the other after verdict.]

To remove all doubt as to this, the words now constantly inserted in the mutiny act are, *that no person, listed as a volunteer in his Majesty's service as a soldier, shall be liable to be taken out of his Majesty's service by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, &c.*

The construction of a mutiny act has been, that if more than ten pounds had been recovered by a judgment for damages and costs, in an action for a debt under ten pounds, and a second action be brought upon the judgment, a soldier shall not be discharged upon common bail; the court being of opinion, that, as the debt which they were to consider was the sum recovered by the judgment, the defendant ought to be holden to special bail.

But it is provided by the present mutiny act, and by all the mutiny acts for some years past it hath been provided, *that the original debt, for which execution may be issued, must amount to ten (a) pounds at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded.*

A trooper, who listed on the sixteenth day of May, was arrested upon the nineteenth. Upon a motion to discharge him upon filing common bail it was said for the plaintiff, that, as the affidavit only went to his having been learning to ride, this was not doing duty as the act requires, but was only to qualify himself for the doing it: but by the court—It is doing duty, he receives his pay and must be discharged on common bail.

Upon a motion to discharge a gunner in the train of artillery upon filing common bail, it was insisted for the plaintiff, that a gunner receives one shilling *per* day for his pay, that he is appointed by warrant, and that he is in the nature of a commission officer. It was answered, that a gunner is listed as a common soldier is, and that he is liable to all the penalties in the mutiny act to which a common soldier is liable. He was discharged upon common bail; and by the court—We are informed that a gunner is within the description of a common soldier (b), the extraordinary pay being only in consideration of the skill requisite in his place.

"drummer is a soldier with a drum." Goodall's case, 1 Wm. 216. S. C. 2 Bl. Rep. 29 under the name of Lloyd v. Woodall.]

11 Mod.  
191.  
Anon.

Masell v.  
Davys,  
11 Mod.  
234.  
[Mason v.  
Vowson, Id.  
252.  
In both these  
cases there  
was fraud;]

Nichol v.  
Wildier,  
Barnes, 432.

[(a) By the  
late acts in-  
creased to  
twenty  
pounds.]  
Bagley v.  
Jenners,  
1 Str. 22.

Johnson v.  
Lowth,  
1 Str. 7.  
10 Mod.  
346. S. C.  
[(b) So are  
serjeants and  
drummers;  
for by De-  
nison, J.  
"a serjeant  
"is a soldier  
"with a  
"halbert;  
"and a

Sayer, 107.  
Methuen v.  
Martin,  
Mich.  
27 G. 2.

Upon a rule to shew cause why a sum of money paid by the defendant should not be repaid, it appeared, that the defendant was a private man in one of the troops of life-guards; and that, being arrested for a debt under ten pounds, he paid the debt in order to obtain his liberty: one question was, Whether the defendant be such soldier, as is by the 26 G. 2. c. 5. exempted from being liable to an arrest for a debt under ten pounds? *Wright, J. Denison, J. Lee, C. J.* being absent, were of opinion that he is. And by *Wright, J.* it is declared by that statute "That no person, who shall be listed, or shall list himself as a volunteer in his Majesty's service, as a soldier, shall be liable to be taken out of his Majesty's service by any process, other than for some criminal matter, unless for a real debt of ten pounds." *Foster, J.* inclined to be of opinion, that as a person, instead of receiving money, pays a considerable sum upon being admitted as a private man into a troop of life-guards, such person is not a soldier within the meaning of that statute. At another day, a certificate being produced from the commissary-general's office, that the defendant did list himself as a volunteer; and it appearing, that the articles of war were read over to him; and that the oath directed to be administered to a listed soldier by a justice of the peace was taken by him; *Foster, J.* concurred in opinion with the other justices. Another question was, Whether, although the defendant would, whilst under the arrest, have been entitled to the discharge of his person, he be now entitled to have the money paid to obtain his liberty repaid? It was holden, that he is; and by the court—It is equally reasonable, that the money paid by the defendant to obtain his liberty should be repaid, as that his person, in case the application had been on that account, should have been discharged.

Bower v.  
Owen,  
Barnes, 432.

An out-pensioner of *Chelsea* College having been arrested, a question arose, Whether he were entitled to his discharge as being a soldier in his Majesty's service? It was holden that he was not; because he is not under military discipline, and only subject to the controul of the commissioners of the College.

Rex v.  
Archer,  
2 Term Rep.  
270. Rex  
v. Bowen, 5

[These acts are confined to proceedings in civil actions, and will not protect soldiers imprisoned for disobeying orders of justices, or on any other criminal account.]

Term Rep. 156.

### (C) Of quartering Soldiers.

BY the 36 G. 3. c. 24. § 24, 25. after reciting, that whereas by the petition of right, in the third year of King *Charles* the First, it is enacted and declared, that the people of the land are not by the laws to be burdened with the sojourning of soldiers against their wills; and by a clause in an act of parliament, made in the one-and-thirtieth year of the reign of King *Charles* the Second, it is declared and enacted, that no officer civil or military, or other person whatsoever, should from thenceforth presume to place, quarter, or billet any soldier or soldiers upon any subject or inhabitant

inhabitant of this realm of any degree, quality, or profession whatsoever, without his consent; and that it shall and may be lawful for any subject, sojourner, or inhabitant to refuse to quarter any soldier or soldiers, notwithstanding any demand or warrant or billeting whatsoever: but so far as at this time, and during the continuance of this act, there is and may be occasion for the marching and quartering of regiments, troops, and companies in several parts of this kingdom, it is enacted, "That for and during the continuance of this act, and no longer, it shall and may be lawful to and for the constables, tithingmen, headboroughs, and other chief officers and magistrates of cities, towns, and villages, and other places within *England, Wales*, and the town of *Berwick upon Tweed*, and in their default or absence, for any one justice of the peace, inhabiting in or near any such city, town, village, or place, and for no others; and such constables and other chief magistrates as aforesaid are hereby required to quarter and billet the officers and soldiers in his Majesty's service in inns, livery-stables, ale-houses, victualling-houses, and the houses of sellers of wine by retail to be drunk in their own houses or places thereunto belonging, other than and except persons who keep taverns only, being freemen of the company of vintners of the city of *London*, who were admitted to the freedom before the 5th day of *July* 1757, or who since have, or shall hereafter be admitted to their freedom of the said company in right of patrimony or apprenticeship, notwithstanding such persons who keep taverns only have taken out victualling licences; and all houses of persons selling brandy, strong waters, cyder, or meth-eglin by retail to be drunk in houses, other than and except the houses of distillers, who keep houses or places of distilling brandy or strong waters, and the house of any shopkeeper, whose principal dealings shall be more in other goods and merchandizes than in brandy or strong waters, so as such distillers or shopkeepers do not permit or suffer tippling in his or their houses, and in no other, and in no private house whatever; nor shall any more billets at any time be ordered, than there are effective soldiers present to be quartered."

By the same section it is provided, "That if any constable, tithingman, or such like officer, or magistrate as aforesaid, shall presume to quarter or billet any officer or soldier in any private house, without the consent of the owner or occupier, in such case such owner or occupier shall have his or their remedy at law against such magistrate or officer, for the damage that such owner or occupier shall sustain thereby."

In an action of trespass against a constable for quartering a dragoon upon the plaintiff, it was found by a special verdict, that the plaintiff kept a house at *Epston*, and let lodgings to such as came there for the benefit of the air and waters, that he dressed meat for his lodgers at four pence *per* joint, and sold them small beer at two pence *per* mug, and that he likewise found them stable room, hay, and other things for horses, at certain rates, and the question was, Whether he were liable to have a soldier quartered upon

upon him? It was holden that he was not; and by *Helt*, Ch. J. —This case is so plain, that there is no occasion for giving reasons.

By the 36 G. 3. c. 24. § 24. it is provided, “ That if any military officer shall take upon him to quarter soldiers, otherwise than is limited and allowed by this act, or shall use or offer any menace or compulsion to any mayors, constables, or other civil officers before mentioned, tending to destroy or discourage any of them from performing any part of their duty hereby required or appointed, such military officer shall for every such offence, being thereof convicted before any two or more of the justices of the peace of the county, by the oath of two credible witnesses, be deemed and taken to be *ipso facto* cashiered, and shall be utterly disabled to have or hold any military employment within this kingdom, or in his Majesty’s service; provided the said conviction be affirmed at the next quarter-sessions of the peace of the said county, and a certificate thereof be transmitted to the Judge Advocate, who is hereby obliged to certify the same to the next court-martial.”

By § 48. it is enacted, “ That if any officer military or civil, by this act authorized to quarter soldiers in any houses hereby appointed for that purpose, shall at any time during the continuance of this act quarter the wives, children, or men or maid servants of any officer or soldier, in any such houses against the consent of the owners, the party offending, if an officer of the army, shall upon complaint and proof thereof made to the commander in chief of the army, or Judge Advocate, be *ipso facto* cashiered; and if a constable, tithingman, or other civil officer, he shall forfeit to the party aggrieved twenty shillings, upon complaint and proof made thereof to the next justice of peace, to be levied by warrant of such justice by distress and sale of his goods.”

By § 24. it is provided, “ That in case any person shall find himself aggrieved, in that such constable, tithingman, or headborough, chief officer, or magistrate, such chief officer or magistrate, not being a justice of the peace, has quartered or billeted in his house a greater number of soldiers than he ought to have in proportion to his neighbours, and shall complain thereof to one or more justices of the peace of the division, city, or liberty where such soldiers are quartered; or in case such chief officer or magistrate shall be a justice of the peace, then on complaint made to two or more justices of the peace of such division, city, or liberty, such justices respectively shall have, and have hereby power to relieve such person, by ordering such and so many of the soldiers to be removed, and quartered upon such other person or persons as they shall see cause; and such other person or persons shall be obliged to receive such soldiers accordingly.”

By § 25. it is enacted, “ That no justice or justices of the peace, having or executing any military office or commission in that part of *Great Britain* called *England*, shall and may, during the continuance of this act, directly, or indirectly be concerned  
“ in



“ in the quartering, billeting, or appointing any quarters for any  
 “ soldier or soldiers in the regiment, troop, or company, under  
 “ the immediate command or commands of such justice or jus-  
 “ tices according to the disposition made for quartering of any  
 “ soldier or soldiers by virtue of this act; but that all warrants,  
 “ acts, matters, or things executed or appointed by such justice or  
 “ justices of the peace, for or concerning the same, shall be void,  
 “ any thing in this act to the contrary notwithstanding.”

By § 28. it is enacted, “ That if any officer shall take or  
 “ cause to be taken, or knowingly suffer to be taken, any money  
 “ of any person, for excusing the quartering of officers or soldiers,  
 “ or any of them, in any house allowed by this act, every such  
 “ officer shall be cashiered, and be incapable of serving in any  
 “ military employment whatsoever.”

[By § 29. after reciting that inconveniencies arise from bil-  
 leting dragoons and their horses at different houses, it is  
 enacted, “ That in all places where horse or dragoons shall be  
 “ quartered or billeted in pursuance of the act, for the future,  
 “ the men and their horses shall be billeted in one and the same  
 “ house (except in case of necessity); and that in no other case  
 “ whatever there be less than one man billeted where there shall  
 “ be one or two horses, nor less than two men where there shall  
 “ be four horses, and so in proportion for a greater number; and  
 “ in such case each man shall be billeted as near his horse as  
 “ possible.”]

By § 30. after reciting, that some doubts have arisen, whether  
 commanding officers of any regiment, troop, or company, may  
 exchange any man or horse quartered in any town or place, with  
 another man or horse quartered in the same place, for the benefit  
 of the service, it is enacted, “ That such exchange as above  
 “ mentioned may be made by such commanding officers respect-  
 “ ively, provided the number of men and horses do not exceed  
 “ the number at that time billeted on such house or houses; and  
 “ the constables, tithingmen, headboroughs, and other chief  
 “ officers or magistrates of the cities, towns, and villages, or  
 “ other places, where any regiment, troop, or company shall be  
 “ quartered, are hereby required to billet such men and horses  
 “ hereby exchanged accordingly.”

[By § 31. it is enacted, “ That the officers, men, and horses  
 “ belonging to his Majesty’s horse or dragoons, shall be quartered  
 “ in the inns, livery stables, ale-houses, victualling-houses, and  
 “ other houses in which officers and soldiers are by the act allowed  
 “ to be quartered, and shall be received and furnished by the  
 “ owner or occupier of such inns, &c. with diet and small beer,  
 “ and with stables, and hay, and straw for their horses, paying  
 “ and allowing for the same the several rates hereinafter men-  
 “ tioned, to be payable out of the subsistence-money for diet and  
 “ small beer, and hay and straw for their horses.”

But by § 32. “ When any horse or dragoons shall be quartered  
 “ upon the owner or occupier of any ale-house, victualling-house,  
 “ or other house in which officers or soldiers may be quartered,

“ who have no stables, then, upon complaint made by the person  
 “ having no stables, to two or more of the justices of the  
 “ peace of the division, city, or liberty where such horse or  
 “ dragoons shall be so quartered, and upon his making such allow-  
 “ ance in lieu of his quartering such horse or dragoons, as such  
 “ justices shall think reasonable, such justices may order the men  
 “ and their horses to be removed, and quartered upon some other  
 “ person who by the act is liable to have officers and soldiers  
 “ quartered upon him who has stables, and may order and settle  
 “ a proper allowance to be made by the person having no stables  
 “ in lieu of his quartering such horse or dragoons, so to be  
 “ removed as aforesaid: and also may order and direct such allow-  
 “ ance to be paid by the person from whom the men or horses  
 “ shall be removed, to or amongst the person or persons to whom  
 “ such men and their horses shall be so removed, or be applied in  
 “ the furnishing of quarters for such men and their horses, as the  
 “ case may require, and as such justices shall think fit.”]

By § 68. it is enacted, “ That if any high constable, consta-  
 “ ble, beadle, or other officer or person whatsoever, who by  
 “ virtue or colour of this act shall quarter or billet, or be em-  
 “ ployed in quartering or billeting any officers or soldiers, shall  
 “ neglect or refuse, for the space of two hours, to quarter or billet  
 “ such officers or soldiers, when thereunto required in such man-  
 “ ner as is by this act directed, provided sufficient notice be given  
 “ before the arrival of such troops; or shall receive, demand,  
 “ contract, or agree for any sum or sums of money, or any  
 “ reward whatsoever, for or on account of excusing, or in  
 “ order to excuse, any person or persons whatsoever from quar-  
 “ tering, or receiving into his, her, or their house or houses, any  
 “ such officer or soldier, and shall be thereof convicted before any  
 “ one or more justice or justices of peace of the county, city, or  
 “ liberty within which such offence shall be committed, either by  
 “ his own confession, or by the oath of one or more credible wit-  
 “ nesses or witnesses, which oath the said justice or justices is and  
 “ are hereby empowered to administer, every such high constable,  
 “ constable, beadle, or other officer or person so offending, shall  
 “ forfeit for every such offence the sum of five pounds, or  
 “ any sum of money not exceeding five pounds, nor less  
 “ than forty shillings, as the said justice or justices, before whom  
 “ the matter shall be heard, shall in his or their discretion think  
 “ fit, to be levied by distress and sale of the goods of the person  
 “ offending, by warrant under the hand and seal, or hands and  
 “ seals, of such justice or justices before whom such offender shall  
 “ be convicted, or one or more of them, to be directed to any  
 “ other constable within the county, city, or liberty, or to any of  
 “ the overseers of the poor of the parish where the offender shall  
 “ dwell; the said sum of five pounds, or the said sum not exceed-  
 “ ing five pounds, nor less than forty shillings, when levied, to be  
 “ paid to the overseers of the poor of the parish wherein the  
 “ offence shall be committed, or to some one of them, for the use  
 “ of the poor of the parish.”

By

By § 69. it is enacted, " That it shall and may be lawful to  
 " and for any one or more justice or justices of the peace, within  
 " their respective counties, cities, or liberties, by warrant or order  
 " under his or their hand and seal, or hands and seals, at any  
 " time or times during the continuance of this act, to require  
 " and command any high constable, constable, beadle, or other  
 " officer, who shall quarter or billet any soldiers in pursuance of  
 " this act, to give an account in writing, unto the said justice or  
 " justices requiring the same, of the number of officers or sol-  
 " diers who shall be quartered or billeted by them, and also the  
 " names of the housekeepers or persons upon whom every such  
 " officer or soldier shall be quartered or billeted, together with  
 " an account of the street or place where every such housekeeper  
 " dwells, and the signs, if any, belonging to their houses; to the  
 " end it may appear to the said justice or justices where such  
 " officers and soldiers are quartered and billeted, and that he or  
 " they may be thereby the better enabled to prevent or punish all  
 " abuses in the quartering or billeting of them."

By § 26. it is enacted, " That the officers and soldiers, quar-  
 " tered and billeted as aforesaid, shall be received and furnished  
 " with diet and small beer by the owners of the inns, livery  
 " stables, ale-houses, victualling-houses, and other houses in  
 " which they are allowed to be quartered and billeted by this  
 " act, paying and allowing for the same the several rates herein-  
 " after mentioned, to be payable out of the subsistence-money  
 " for diet and small beer."

But by § 27. it is provided, " That in case any inn-holder or  
 " other person, on whom any non-commission officers or private  
 " men shall be quartered by virtue of this act, except on a march  
 " or employed in recruiting, and likewise except the recruits by  
 " them raised, for the space of seven days at most, for such non-  
 " commission officers and soldiers, who are recruiting, and recruits  
 " by them raised, shall be desirous to furnish such non-commis-  
 " sion officers or soldiers with candles, vinegar, and salt, and with  
 " either small beer or cyder, not exceeding five pints for each  
 " man *per diem gratis*, and allow to such non-commission officers  
 " or soldiers the use of fire, and the necessary utensils for dressing  
 " and eating their meat (a), and shall give notice of such his  
 " desire to the commanding officer, and shall furnish and allow  
 " the same accordingly; then in such case the non-commission  
 " officers and soldiers so quartered shall provide their own vic-  
 " tuals."

By § 37. to the end that the quarters of officers and soldiers may  
 be duly paid and satisfied, and his Majesty's duties of excise better  
 answered, it is enacted, " That every officer, to whom it belongs to  
 " receive, or that does actually receive, the pay, or subsistence mo-  
 " ney, either for a whole regiment, or particular troops or compa-  
 " nies, or otherwise, shall immediately upon each receipt of every  
 " particular sum, which shall from time to time be paid, returned,  
 " or come to his or their hands on account of pay or subsistence, give  
 " public notice thereof to all persons keeping inns or other places,

[Note; the  
 36 G. 3.  
 c. 36. § 4.  
 repeals so  
 much of this  
 act as relates  
 to furnishing  
 with diet  
 non-com-  
 missioned  
 officers and  
 soldiers on a  
 march or  
 recruiting ]  
 [(a) By the  
 above act,  
 § 2. *ad. per  
 diem* is now  
 allowed for  
 these ar-  
 ticles.]

" where officers or soldiers are quartered by virtue of this act ;  
 " and shall appoint the said inn-keepers and others to repair to  
 " their quarters, at such times as they shall appoint for the distri-  
 " bution and payment of the said pay or subsistence-money to  
 " soldiers, which shall be within four days at the furthest after  
 " the receipt of the same as aforesaid: and the said inn-keepers  
 " and others shall then and there acquaint such officer or officers  
 " with the accounts or debts, if any shall be, between them and  
 " the officers and soldiers to quartered in their respective houses ;  
 " which accounts the said officer or officers are hereby required  
 " to accept of, and immediately pay the same, before any part of  
 " the said pay or subsistence-money be distributed either to the  
 " officers or soldiers : provided the said accounts exceed not, for  
 " a commission officer of horse, being under the degree of a cap-  
 " tain, for such officer's diet and small beer *per diem* two shillings ;  
 " nor for one commission officer of dragoons, being under the  
 " degree of a captain, for such officer's diet and small beer *per*  
 " *diem* one shilling ; nor for one commission officer of foot, being  
 " under the degree of a captain, for such officer's diet and small  
 " beer *per diem* one shilling ; and if such officer shall have a horse  
 " or horses, for each horse or horses for their hay and straw *per*  
 " *diem* six pence ; nor for one light horseman's diet and small  
 " beer *per diem* six pence (a), and hay and straw for his horse *per*  
 " *diem* six pence ; nor for one dragoon's diet and small beer *per*  
 " *diem* six pence, and hay and straw for his horse *per diem* six  
 " pence ; nor for one foot soldier's diet and small beer *per diem*  
 " four pence : and if any officer or officers as aforesaid shall not  
 " give notice as aforesaid, and shall not, immediately upon pro-  
 " ducing such account stated, satisfy, content, and pay the same,  
 " upon complaint and oath made thereof by any two witnesses,  
 " at the next quarter-sessions for the county or city where such  
 " quarters were, which oath the justices of the peace at such ses-  
 " sions are hereby authorized and required to administer, the  
 " paymaster or paymasters of his Majesty's guards, garrisons, and  
 " marines are hereby required and authorized, upon certificate  
 " of the said justices before whom such oath was made of the  
 " sums due upon such accounts, and the persons to whom the  
 " same is owing, to pay and satisfy the said sums out of the  
 " arrears due to the said officer or officers, upon penalty that  
 " such paymaster or paymasters shall forfeit their respective place  
 " or places of paymaster or paymasters, and be discharged from  
 " holding the same for the future ; and in case there shall be no  
 " arrears due to the said officer or officers, then the said pay-  
 " master or paymasters are hereby authorized and required, to de-  
 " duct the sums he or they shall pay, pursuant to the certificate of  
 " the said justices, out of the next pay or subsistence-money of  
 " the regiment to which such officer or officers shall belong ; and  
 " such officer or officers shall for every such offence, or for ne-  
 " glecting to give notice of the receipt of such pay or subsistence-  
 " money as aforesaid, be deemed and taken, and are hereby de-  
 " clared *ipso facto* cashiered. And where it shall happen, that the  
 " subsistence-

§ (a) By  
 36 G. 3.  
 c. 36. § 1.  
 the allow-  
 ance for  
 non-com-  
 missioned  
 officers and  
 soldiers, both  
 horse and  
 foot, is rais-  
 ed to 10 d.  
*per diem* for  
 diet and  
 small beer ;  
 and the al-  
 lowance for  
 hay and  
 straw for  
 each horse  
 by § 3. is  
 raised to  
 10½ d. *per*  
*diem*.]

“ subsistence-money due to any officer or soldier shall by occasion  
 “ of any accident not be paid such officer or soldier, or such  
 “ officer or soldier shall neglect to pay the same, so that quarters  
 “ cannot be or are not paid as this act directs; and where any  
 “ horse foot, or dragoons shall be upon their march, so that no  
 “ subsistence can then be remitted to them, to make payment as  
 “ this act directs, or they shall neglect to pay the same; in every  
 “ such case it is hereby further enacted, that every such officer  
 “ shall, before his or their departure out of his or their quarters,  
 “ where such regiment, troop, or company shall remain for any  
 “ time whatsoever, make up the accounts as this act directs,  
 “ with every person with whom such regiment, troop, or com-  
 “ pany have quartered, and sign a certificate thereof, and give the  
 “ said certificate, by him so signed, to the party to whom such  
 “ money is due, with the name of such regiment, troop, or com-  
 “ pany, to which he or they shall belong; to the end the said cer-  
 “ tificate may be forthwith transmitted to the paymaster of his  
 “ Majesty’s guards and garrisons, or to the paymaster of the  
 “ marines, who are hereby required immediately to make pay-  
 “ ment thereof to the person or persons to whom such monies  
 “ shall be due, to the end the same may be applied to such regi-  
 “ ment, troop, or company respectively, under pain as is in this  
 “ act before directed for non-payment of quarters.”

[By 36 G. 3. c. 36. § 5. “ All non-commissioned officers and  
 “ soldiers shall be entitled to receive their diet and small-beer  
 “ from the innholders or other persons on whom they may be bil-  
 “ leted, at the rates in this act prescribed, while on the march, as  
 “ also on the day of their arrival at the place of their final des-  
 “ tination, and on the two subsequent days, unless either of the  
 “ two subsequent days shall be market days in or for the town or  
 “ place where such soldiers shall be billeted, or within two miles  
 “ thereof, in which case the innholder or other person may dis-  
 “ continue on and from such market day the supply of diet and  
 “ small beer, and furnish in lieu thereof the articles specified in  
 “ the mutiny act, and at the rate in this act prescribed.”

“ Provided, by § 6. That if the regiment, troop, company, or  
 “ detachment, when on the march, shall be halted, either for a  
 “ limited or indefinite time, at any intermediate place, the non-  
 “ commissioned officers and soldiers belonging thereto shall be  
 “ entitled to receive their diet and small beer, from the persons  
 “ on whom they shall be billeted at such intermediate place, for  
 “ such time only for which they would be entitled to receive after  
 “ arriving at the place of their final destination, according to this  
 “ act.”

But by § 7. “ Whenever any regiment, troop, &c. when on  
 “ their march, shall be halted, and it shall appear by the march-  
 “ ing orders, that it is not intended that such regiment, &c. shall  
 “ halt for any longer time than one entire day after the day of  
 “ their arrival at the place of halting, and the day after their  
 “ arrival shall be such market day as aforesaid, it shall not be  
 “ lawful for the innholders or other persons, on whom the non-

“ commissioned officers or soldiers shall be billeted, to discontinue  
 “ on such market day the supply of diet and small beer to any such  
 “ officers or soldiers; but all such officers and soldiers shall be  
 “ entitled to receive their diet and small beer from such innholders  
 “ and persons, at the rates above prescribed, as they would have  
 “ been entitled, if such day had not been a market day.”

By § 8. “ All non-commissioned officers and private men  
 “ employed in recruiting, and the recruits by them raised, shall,  
 “ while on the march, and for two days after their arrival at any  
 “ recruiting station, be entitled to the same benefits as are  
 “ hereinbefore provided in regard to troops upon the march;  
 “ but no recruit enlisted after the two days subsequent to the  
 “ arrival of the party at their recruiting station, shall be entitled  
 “ to be supplied with diet and small beer at the rate above pre-  
 “ scribed, except at the option of the person on whom he shall be  
 “ quartered. Provided, that if any such recruiting party, with  
 “ the recruits by them raised, shall remove from their station,  
 “ and after a time shall return to the same place, they, and the  
 “ recruits by them raised, so returning, shall not be again entitled  
 “ to the supply of diet and small beer for such two days as afore-  
 “ said, unless the period between the time of their removal from  
 “ such place, and their return thereto, shall have exceeded twenty-  
 “ eight days.”]

By § 34. it is enacted, “ That it shall and may be lawful to  
 “ quarter officers and soldiers in *Scotland*, in such and the like  
 “ places and houses as they might have been quartered in by the  
 “ laws in force in *Scotland* at the time of the Union; and that the  
 “ possessors of such houses shall only be liable to furnish the said  
 “ officers and soldiers quartered there, as by the said laws in force  
 “ at the time of the Union was provided; and that no officer shall  
 “ be obliged to pay for his lodging, where he shall be regularly  
 “ billeted, except in the suburbs of *Edinburgh*.”

By § 68. it is enacted, “ That if any victualler or any  
 “ other person liable by this act to have any officer or sol-  
 “ dier quartered or billeted on him or her, shall refuse to  
 “ receive or victual any such officer or soldier quartered or  
 “ billeted upon him or her as aforesaid; or shall refuse to  
 “ furnish or allow, according to the directions of this act, the  
 “ several things hereinbefore respectively directed to be fur-  
 “ nished or allowed to non-commission officers or soldiers so quar-  
 “ tered or billeted on him or her as aforesaid; or shall neglect or  
 “ refuse to furnish good and sufficient hay and straw for each  
 “ horse quartered or billeted on him or her as aforesaid, at the  
 “ rate herein before mentioned, and shall be thereof convicted,  
 “ before one or more justice or justices of the peace of the  
 “ county, city, or liberty within which such offence shall be com-  
 “ mitted, either by his own confession, or by the oath of one or  
 “ more credible witness or witnesses, which oath the said justice or  
 “ justices is and are hereby empowered to administer, every person  
 “ so offending shall forfeit for every such offence the sum of  
 “ five pounds, or any sum of money not exceeding five pounds  
 “ nor

“ nor less than forty shillings, as the said justice or justices, before  
 “ whom the matter shall be heard, shall in his or their discretion  
 “ think fit, to be levied by distress and sale of the goods of the  
 “ person offending, by warrant under the hand and seal, or under  
 “ the hands and seals, of such justice or justices before whom such  
 “ offender shall be convicted, or one or more of them, to be directed  
 “ to any other constable within the county, city, or liberty, or to  
 “ any of the overseers of the poor of the parish where the offender  
 “ shall dwell; the said sum of five pounds, or the said sum not  
 “ exceeding five pounds nor less than forty shillings, when levied,  
 “ to be paid to the overseers of the poor of the parish wherein  
 “ the offence shall be committed, or to some one of them, for the  
 “ use of the poor of the said parish.”

In an action of trespass against two justices of the peace, who had issued a warrant for levying the penalty upon the plaintiff for not receiving a soldier billeted upon him, the case appeared upon the evidence to be thus: a shopkeeper, who likewise dealt in spirituous liquors, in order to entitle himself to a licence for selling spirituous liquors by retail, had a licence as a victualler. For the sake of obtaining this last licence, some beer was laid in by him, of which an account was taken by the excise officer, as is done of the stock of a victualler; but he never sold any of this, nor acted in any manner as a victualler, nor suffered spirituous liquors to be drank in his house. The plaintiff was nonsuited, for want of producing the warrant of the two justices; but *Foster, J.* before whom the cause was tried, said, he should upon the merits have been of opinion, that the plaintiff was not liable to have soldiers quartered upon him.

MS. Rep.  
 Morton v.  
 Cloebury  
 and another,  
 Bucks,  
 Lent Assize  
 1757.

By the 8 G. 2. c. 30. § 1. after reciting, that by the ancient common law of this land all elections ought to be free; and that by an act passed in the third year of the reign of King *Edward the First*, of famous memory, it is commanded upon great forfeiture, that no man by force of arms, nor by malice or menacing, shall disturb any to make free election; and that the freedom of elections of members to serve in parliament is of the utmost consequence to the preservation of the rights and liberties of this kingdom; and that it hath been the usage and practice, to cause any regiment, troop, or company, or any number of soldiers, which hath been quartered in any city, borough, town, or place where any election of members to serve in parliament hath been appointed to be made, to remove and continue out of the same during the time of such election, except in such particular cases as are hereinafter specified; to the end that the said usage and practice may be settled and established for the future, it is enacted, “ That  
 “ when and as often as any election of any peer or peers to represent the peers of *Scotland* in parliament, or of any member or  
 “ members to serve in parliament, shall be appointed to be made, the  
 “ secretary at war for the time being, or in case there shall be no secretary at war, then such person who shall officiate in the place of  
 “ the secretary at war, shall and is hereby required, at some convenient time before the day appointed for such election, to issue  
 “ and

“ and send forth proper orders in writing, for the removal of  
 “ every such regiment, troop, or company, or other number of  
 “ soldiers, as shall be quartered or billeted in any such city,  
 “ borough, town, or place, where such election shall be appointed  
 “ to be made, out of every such city, borough, town, or place,  
 “ one day at least before the day appointed for such election, to  
 “ the distance of two or more miles from such city, borough,  
 “ town, or place, and not to make any nearer approach to such  
 “ city, borough, town, or place as aforesaid, until one day at the  
 “ least after the poll to be taken at such election shall be ended,  
 “ and the poll books closed.”

By § 2. it is enacted, “ That in case the secretary at war for  
 “ the time being, or such person who shall officiate in the place  
 “ of the secretary at war, shall neglect or omit to issue or send  
 “ forth such orders as aforesaid, according to the true intent and  
 “ meaning of this act, and shall be thereof lawfully convicted,  
 “ upon any indictment to be presented at the next assizes, or ses-  
 “ sions of oyer and terminer, to be held for the county where such  
 “ offence shall be committed, or on an information to be exhibited  
 “ in the court of King’s Bench, within six months after such  
 “ offence committed, such secretary at war, or person who shall  
 “ officiate in the place of the secretary at war, shall for such of-  
 “ fence be discharged from their said respective offices, and shall  
 “ from thenceforth be utterly disabled, and made incapable to  
 “ hold any office or employment civil or military in his Majesty’s  
 “ service.”

But by § 5. it is provided, “ That the secretary at war, or such  
 “ person who shall officiate in the place of the secretary at war,  
 “ shall not be liable to any forfeiture or incapacity, for not send-  
 “ ing such order as aforesaid, upon any election to be made of a  
 “ member to serve in parliament on a vacancy of any seat there,  
 “ unless notice of the making out any new writ for such election  
 “ shall be given to him by the clerk of the crown in Chancery, or  
 “ other officer making out any new writ for such election, which  
 “ notice he is hereby directed and required to give with all con-  
 “ venient speed after the making out the said writ.”

By § 3. it is provided, “ That nothing in this act contained  
 “ shall extend, or be construed to extend, to the city and liberty of  
 “ *Westminster*, or the borough of *Southwark*, for or in respect of  
 “ the guards of his Majesty, his heirs or successors, nor to any  
 “ city, borough, town, or place, where his Majesty, his heirs or  
 “ successors, or any of his royal family, shall happen to be or re-  
 “ side at the time of any such election as aforesaid, for or in respect  
 “ of such number of troops or soldiers only as shall be attendant  
 “ as guards to his Majesty, his heirs or successors, or to such other  
 “ person of the royal family as is aforesaid; nor to any castle,  
 “ fort, or fortified place, where any garrison is usually kept, for  
 “ or in respect of such number of troops or soldiers only, whereof  
 “ such garrison is composed.”

By § 4. it is provided, “ That nothing in this act shall extend,  
 “ or be construed to extend, to any officer or soldier, who shall  
 “ have



“ have a right to vote at any such election as aforesaid, but that  
 “ every such officer and soldier may freely, and without interrup-  
 “ tion, attend and give his vote at such election; any thing herein  
 “ before contained to the contrary notwithstanding.”

#### (D) Of Carriages for the Use of His Majesty's Forces.

BY the 36 G. 3. c. 3. § 42. it is enacted, “ That for the better  
 “ and more regular provision of carriages for his Majesty's  
 “ forces, in their marches, or for their arms, clothes, and accou-  
 “ trements, in *England, Wales*, and the town of *Berwick-upon-*  
 “ *Tweed*, all justices of the peace, within their several counties,  
 “ ridings, divisions, shires, liberties, and precincts, being duly re-  
 “ quired thereunto by an order from his Majesty, or the general  
 “ of his forces, or the master general, or lieutenant general of his  
 “ Majesty's ordnance, shall, as often as such order is brought and  
 “ shewn unto one or more of them, by the quarter-master, adju-  
 “ tant, or other officer of the regiment, detachment, troop, or  
 “ company so ordered to march, issue out his or their warrants, to  
 “ the constables or petty constables of the division, riding, city,  
 “ liberty, hundred, and precinct, from, through, near, or to which  
 “ such regiment, detachment, troop, or company shall be ordered  
 “ to march, requiring them to make such provision for carriages,  
 “ with able men to drive the same, as is mentioned in the said  
 “ warrant, allowing them sufficient time to do the same, that the  
 “ neighbouring parts may not always bear the burden; and in  
 “ case sufficient carriages cannot be provided within any such li-  
 “ berty, division, or precinct, then the next justice or justices of  
 “ the peace of the county, riding, or division shall, upon such order  
 “ as aforesaid being brought and shewn to one or more of them  
 “ by any of the officers aforesaid, issue his or their warrants to  
 “ the constables or petty constables of such next county, riding,  
 “ liberty, division, or precinct, for the purposes aforesaid, to make  
 “ good such deficiency: and the aforesaid officer or officers, who  
 “ by virtue of the aforesaid warrant from the justices of the peace  
 “ are to demand the carriage or carriages therein mentioned of  
 “ the constable or petty constable to whom the warrant is di-  
 “ rected, is and are hereby required, at the same time to pay down  
 “ in hand to the said constable or petty constable, for the use of  
 “ the person who shall provide such carriages and men, the sum  
 “ of one shilling for every mile any waggon with five horses shall  
 “ travel; and the sum of one shilling for every mile any wain  
 “ with six oxen, or four oxen with two horses shall travel; and  
 “ the sum of nine pence for every mile any cart with four horses  
 “ shall travel; and so in proportion for less carriages; for which  
 “ respective sums so received, the said constable or petty constable  
 “ is hereby required to give a receipt in writing to the person or  
 “ persons paying the same: and such constable or petty constable  
 “ shall order and appoint such person or persons, having carriages  
 “ within their respective liberties, as they shall think proper, to  
 “ provide and furnish such carriages and men, according to the  
 “ warrant.

“ warrant aforesaid, who are hereby required to provide and furnish the same accordingly.”

By § 47. it is enacted, “ That the carriages, for the service of the forces from time to time quartered or marching in *Scotland*, shall be provided in like manner, and at the rates ; and the furnisher of such carriages shall be paid, as was directed by the law in force in *Scotland* at the time of the Union.”

By § 42. it is enacted, “ That if any military officer or officers, for the use of whose troop or company the carriage was provided, shall force or constrain any waggon, wain, cart, or carriage, to travel more than one day’s journey ; or shall not discharge the same in due time for their return home ; or shall suffer any foldier or servant, except such as are sick, or any woman to ride in the waggon, wain, cart, or carriage aforesaid ; or shall force any constable or petty constable by threatenings or menacing words, to provide saddle horses for themselves or servants ; or shall force horses from the owners by themselves, servants, or soldiers ; every such officer, for every such offence, shall forfeit the sum of five pounds ; proof thereof being made upon oath before two of his Majesty’s justices of the same county or riding, who are to certify the same to the paymaster general, or other respective paymaster of his Majesty’s forces, who is hereby required to pay the aforesaid sum of five pounds, according to the order and appointment, under the hands and seals of the aforesaid justices of the peace of the same county or riding.”

By § 46. it is enacted, “ That no waggon, wain, cart, or carriage, impressed by the authority of this act, shall be liable or obliged by virtue of this act to carry above thirty hundred weight ; any thing in this act contained to the contrary notwithstanding.”

By § 43. it is enacted, “ That if any high constable or petty constable shall wilfully neglect or refuse to execute such warrants of the justices of the peace, as shall be directed unto them for providing carriages as aforesaid ; or if any person or persons appointed by such high constable or petty constable to provide any carriage and man, shall refuse or neglect to provide the same ; or any other person or persons whatsoever shall wilfully do any act or thing, whereby the execution of the said warrant shall be hindered or frustrated ; every such constable or other person or persons so offending shall, for every such offence, forfeit any sum not exceeding forty shillings nor less than twenty shillings, to the use of the poor of the parish where any such offence shall be committed : And all and every such offence and offences shall and may be inquired of, heard, and fully determined by two of his Majesty’s justices of the peace dwelling in or near the place where such offence shall be committed, who have hereby power to cause the said penalty to be levied by distress and sale of the offender’s goods.”

By § 44. after reciting, that whereas the respective sums of money, by this act appointed to be paid to the constable by the officers

cers demanding such carriages, are not in many cases sufficient to answer the charge and expence of providing the same, inasmuch that the said constable is frequently at great charges, over and above what is received by him of the said officers, to the great burden of the township of which he is constable, or else the persons performing such carriages are grievously oppressed: For remedy thereof, and that the said overplus charge may be borne by each county or riding at the general charge of such county or riding, it is enacted, " That the treasurer or treasurers of each respective  
 " county or riding shall, without fee or reward, pay unto such  
 " constable all and every such reasonable sum or sums of money,  
 " so by him paid or laid out for such carriages, over and above what  
 " was or ought to have been paid by the officer requiring such  
 " carriages, out of the publick stock of such county or riding, according to such rates, orders, rules, and directions as the said  
 " justices of the peace in their quarter-sessions assembled within  
 " their respective jurisdictions shall from time to time during the  
 " continuance of this act make, direct, and appoint, which orders shall be made without fee or reward, regard being always  
 " had to the season of the year, and the length and condition of  
 " the ways by and through which such carriages are to travel."

The court granted a *mandamus* upon the 1 G. 1. c. 34. directed to the justices of the peace, to allow the defendants, being constables, their extraordinary charges in providing carriages on the late expedition into *Scotland*.

It seems, as if the treasurer of the county had refused to pay this money to the constables; for more than a year after another *mandamus*, upon the same statute, was granted by the court, directed to the justices of peace, for them to compel the treasurer of the county to reimburse a constable, of the name of *Hunt*, the extraordinary charges he had been at in providing carriages on the late expedition into *Scotland*.

Stra. 42.  
 Rex v.  
 Hunt and  
 another,  
 Hil. 3 G. 1.  
 Stra. 93.  
 Hunt's case.  
 East. 4 G. 1.

### (E) Of the Penalties incurred by encouraging Desertion or harbouring a Deserter, and of the Reward for apprehending a Deserter.

BY the 1 G. 1. stat. 2. c. 47. § 1. after reciting, that a pernicious and dangerous practice has been industriously carried on in these kingdoms of *Great Britain* and *Ireland*, by papists and other evil-disposed persons disaffected to his Majesty's title and government, under false and groundless pretences, to delude his good subjects, who had engaged themselves as soldiers in the service of his Majesty and their country, and to prevail with them by corrupt and indirect means to desert the same, oftentimes in order to procure their assistance for a popish Pretender, the avowed enemy of the protestant religion, and the laws and liberties of these kingdoms; for which purposes the said papists, and other evil-disposed persons, have with great diligence frequented the publick houses and other places where the said soldiers used to resort or are quartered,

tered, and by entertainments, seditious speeches, and vain promises, have often seduced his Majesty's said subjects from their duty and allegiance, it is enacted, " That if any person or persons whatsoever, other than such as are or shall be enlisted as soldiers, against whom sufficient remedy is already provided by law, shall by words or other means whatsoever, directly or indirectly, persuade or procure any soldier or soldiers in the service of his Majesty, his heirs or successors, to desert or leave such service, or shall go about and endeavour in manner aforesaid to persuade, prevail on, or procure such soldier or soldiers to desert or leave such service as aforesaid, every such person or persons so offending as aforesaid, and being thereof lawfully convicted, shall for every such offence forfeit to his Majesty, his heirs or successors, or to any other person or persons who shall sue for the same, the sum of forty pounds, to be recovered by bill, plaint, or information, in any of his Majesty's courts of record at *Westminster*; and if it shall happen that any such offender, so convicted as aforesaid, hath not any goods or chattels, lands or tenements, to the value of forty pounds, to pay and satisfy the same, or that from the circumstances and heinousness of the crime it shall be thought proper and convenient, the court, before which the said conviction shall be made as aforesaid, shall award the said offender to prison, there to remain for any time not exceeding six months without bail or mainprize, and also to stand in the pillory for the space of one hour, in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

But by § 2. it is provided, " That no action shall be brought or prosecution carried on by virtue of this act, unless the same be commenced within six months after the offence is committed."

By the 36 G. 3. c. 3. § 64. it is enacted, " That for such offences as shall be committed against the last recited act within that part of *Great Britain* called *England*, the penalties thereby enacted shall be sued for and recoverable in any of his Majesty's courts of record at *Westminster*; and for such offences as shall be committed in that part of *Great Britain* called *Scotland*, the same shall be sued for and recoverable in his Majesty's court of Exchequer in *Scotland*; and for such offences as shall be committed in *Ireland*, the same shall be sued for and recoverable in any of the four courts in *Dublin*; and for such offences as shall be committed in the islands of *Guernsey*, *Sark*, and *Alderney*, and the islands thereto belonging, the same shall be sued for and recoverable in the royal court of *Guernsey*; and for such offences as shall be committed in the island of *Jersey*, the same shall be sued for and recoverable in the royal court of *Jersey*, and for such offence as shall be committed in the island of *Man*, in any of the courts of record in the said island, or in any of his Majesty's courts of record at *Westminster*; any thing in the said act to the contrary notwithstanding."

By § 51. after reciting, that foldiers duly enlisted do afterwards desert, and are often found wandering and otherwise illegally absenting themselves from his Majesty's service, it is enacted, " That  
 " it shall and may be lawful for the constable, headborough, or  
 " tithingman of the town or place where any person who may  
 " reasonably be suspected to be a deserter shall be found, to ap-  
 " prehend or cause him to be apprehended, and to cause such per-  
 " son to be brought before any justice of the peace living in or  
 " near such town or place, who hath hereby power to examine  
 " such suspected person; and if by his confession, or the testi-  
 " mony of one or more witness or witnesses upon oath, or by the  
 " knowledge of such justice of the peace, it shall appear or be  
 " found, that such suspected person is a listed soldier, and ought  
 " to be with the troop or company to which he belongs, such  
 " justice of the peace shall forthwith cause him to be conveyed to  
 " the gaol of the county or place where he shall be found, or to  
 " the house of correction or other publick prison in such town or  
 " place where such deserter shall be apprehended, or to the *Savoy*,  
 " in case such deserter shall be apprehended within the city of  
 " *London* or *Westminster*, or places adjacent, and transmit an ac-  
 " count thereof to the secretary of war for the time being, to the  
 " end that such person may be proceeded against according to  
 " law; and the keeper of the said gaol, house of correction, or  
 " prison, shall receive the full subsistence of such deserter, during  
 " the time he shall continue in his custody, for the maintenance  
 " of the said deserter, but shall not be entitled to any fee or re-  
 " ward, on account of the imprisonment of such deserter; any law,  
 " usage, or custom to the contrary notwithstanding."

By § 52. For the encouragement of any person or persons to secure and apprehend such deserter as aforesaid, it is enacted,  
 " That such justice of the peace shall also issue his warrant in  
 " writing, to the collector or collectors of the land-tax money of  
 " the parish or township where such deserter shall be apprehended,  
 " for paying out of the land-tax money arisen, or to arise in the  
 " year one thousand seven hundred and seventy-seven, into the  
 " hands of such person, who shall apprehend, or cause to be ap-  
 " prehended, any deserter from his Majesty's service, the sum of  
 " twenty shillings for every deserter that shall be so apprehended  
 " and committed; which sum of twenty shillings shall be satisfied  
 " by such collector or collectors, to whom such warrant shall be  
 " directed, and allowed upon his account."

By § 53. it is provided, " That if any person shall harbour, con-  
 " ceal, or assist any deserter from his Majesty's service, knowing  
 " him to be such, the person so offending shall forfeit for every  
 " such offence the sum of five pounds; and upon conviction, by  
 " the oath of one or more credible witness or witnesses before any  
 " of his Majesty's justices of the peace, the said penalty of five  
 " pounds shall be levied by warrant under the hands of the said  
 " justice or justices of the peace, by distress and sale of the goods  
 " and chattels of the offender; one moiety of the said penalty to  
 " be paid to the informer, by whose means such deserter shall be  
 " appre-

“ apprehended, and the residue of the said penalty to be paid to the officer, to whom any such deserter or soldier did belong :  
 “ And in case any such offender, who shall be convicted as afore-  
 “ said of harbouring and assisting any such deserter, shall not have  
 “ sufficient goods and chattels, whereon distress may be made to  
 “ the value of the penalty for such offence ; or shall not pay such  
 “ penalty within four days after such conviction ; then and in  
 “ such case such justice of the peace shall and may, by warrant  
 “ under his hand and seal, either commit such offender to the  
 “ common gaol, there to remain without bail or mainprize for the  
 “ space of three months, or cause such offender to be publickly  
 “ whipped, at the discretion of such justice.”

But by § 54. it is provided, “ That no commission officer shall  
 “ break open any house, to search for deserters, without a war-  
 “ rant from a justice of the peace ; and that every commission  
 “ officer, who shall without warrant from one or more of his  
 “ Majesty’s justices of the peace, which said warrant the said  
 “ justice or justices of the peace are hereby empowered to grant,  
 “ forcibly enter into, or break open, the dwelling house or out-  
 “ houses of any person whatsoever, under pretence of searching  
 “ for deserters, shall upon due proof thereof forfeit the sum of  
 “ twenty pounds.”

## (F) Of the Military Punishments to which Soldiers are liable.

BY the 36 G. 3. c. 24. § 1. after reciting, that, whereas the raising or keeping a standing army within this kingdom in time of peace, unless it be with consent of parliament, is against law : and whereas it is judged necessary by his Majesty and this present parliament, that a body of forces should be continued for the safety of this kingdom, the defence of the possessions of the crown of *Great Britain*, and the preservation of the balance of power in *Europe* : and whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm ; yet nevertheless, it being requisite for the retaining such forces in their duty that an exact discipline be observed, and that soldiers, who shall mutiny or stir up sedition, or desert his Majesty’s service within this realm, or the kingdom of *Ireland*, or in *Jersey*, *Guernsey*, *Alderney*, and *Sark*, or the islands to the same belonging, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow, it is enacted, “ That if any person, being  
 “ mustered, or in pay as an officer, or who is or shall be listed or  
 “ in pay as a soldier, and on the twenty-fourth day of *March*  
 “ one thousand seven hundred and seventy-seven shall remain in  
 “ such service, or shall, during the continuance of this act, volun-  
 “ tarily enter himself in his Majesty’s service as a soldier, shall at  
 “ any time during such continuance of this act, within the realm  
 “ of *Great Britain*, or the kingdom of *Ireland*, or in *Jersey*, *Guernsey*,  
 “ *Alderney*,

“ *Alderney, Sark, or Man, or the islands thereunto belonging, or*  
 “ *in the island of Minorca, or in his Majesty's garrison of Gibraltar,*  
 “ *or in any of his Majesty's dominions beyond the seas respect-*  
 “ *ively, begin, excite, cause, or join in any mutiny or sedition in*  
 “ *the regiment, troop, or company to which he doth belong, or*  
 “ *in any other regiment, troop, or company, either of his Majes-*  
 “ *ty's land or marine forces, in his Majesty's service; or shall not*  
 “ *use his utmost endeavours to suppress the same, or, coming to*  
 “ *the knowledge of any mutiny or intended mutiny, shall not*  
 “ *without delay give information thereof to his commanding offi-*  
 “ *cer; or shall desert his Majesty's service; or, being a soldier*  
 “ *actually listed in any regiment, troop, or company, shall list*  
 “ *himself into any other regiment, troop, or company, without a*  
 “ *discharge produced in writing from the colonel, or in his ab-*  
 “ *sence the field officer commanding in chief the regiment, troop,*  
 “ *or company in which he last served as a listed soldier; or shall*  
 “ *be found sleeping upon his post, or shall leave it before relieved;*  
 “ *or if any officer or soldier in his Majesty's army shall, either*  
 “ *upon land, within or out of Great Britain, or upon the sea, hold*  
 “ *correspondence with any rebel or enemy of his Majesty, or give*  
 “ *them advice or intelligence, either by letters, messages, signs, or*  
 “ *tokens, in any manner or way whatsoever; or shall treat with*  
 “ *such rebels or enemies, or enter into any condition with them*  
 “ *without his Majesty's licence, or licence of the general, lieu-*  
 “ *tenant-general, or chief commander; or shall strike or use any*  
 “ *violence against his superior officer, being in the execution of*  
 “ *his office; or shall disobey any lawful command of his superior*  
 “ *officer; all and every person and persons so offending, in any*  
 “ *of the matters before mentioned, shall suffer death, or such*  
 “ *other punishment as by a court-martial shall be inflicted.”*

By the 1 G. 1. *§. 2. c. 47. § 3.* after reciting, that to carry on the service of the Pretender, and for other wicked purposes, many papists, pretending themselves to be protestants, and taking the oath of abjuration and subscribing the test when thereunto required, being so allowed to do by the Pope and their other spiritual superiors, the better to disguise and conceal their designs, do enlist themselves in his Majesty's troops, whereby the greatest danger may arise to these kingdoms, if not timely prevented, it is enacted, “ That any person or persons having professed the popish religion, who since the first day of *February* one thousand seven hundred and fifteen have been enlisted in his Majesty's troops, and who shall not after the first day of *June* one thousand seven hundred and sixteen, in *Great Britain or Ireland*, or in the isles of *Guernsey or Jersey*, produce a testimonial of his having publicly renounced the same; or shall not, at the time of his enlisting, declare to the officer or soldier who enlisteth him, that he hath been, or at present is, of the popish religion, shall be liable to and receive such corporal punishment, not extending to loss of life, as a court-martial shall inflict for the same, who are hereby empowered so to do.”

By

By 36 G. 3. c. 24. § 5. it is enacted, "That it shall and may be lawful to and for courts-martial, by their sentence or judgment, to inflict corporal punishment, not extending to life or limb, on any soldier for immoralities, misbehaviour, or neglect of duty."

By § 55 & 56. it is provided, "That it shall and may be lawful to and for his Majesty, to form, make, and establish articles of war for the better governing of his Majesty's forces, and for bringing offenders against the same to justice; and to erect and constitute courts-martial, with power to try, hear, and determine any crimes or offences by such articles of war, and inflict penalties by sentence or judgment of the same, as well within the kingdoms of *Great Britain* and *Ireland*, *Jersey*, *Guernsey*, *Alderney*, *Sark*, and *Man*, and the islands thereto belonging, as in the island of *Minorca*, his Majesty's garrison of *Gibraltar*, and in any of his Majesty's dominions beyond the seas."

But by § 57. it is provided, "That no person or persons shall be adjudged to suffer any punishment extending to life or limb by the said articles of war, within the kingdoms of *Great Britain* and *Ireland*, *Jersey*, *Guernsey*, *Alderney*, *Sark*, and *Man*, and the islands thereto belonging, except for such crimes as are expressed to be so punishable by this act; [nor for such crimes as are expressed to be so punishable, in any manner, or under any regulations, which shall not accord with the provisions of this act.]"

By § 58. it is enacted, "That if any officer or soldier shall, in any of his Majesty's dominions beyond the seas, or elsewhere beyond the seas, commit any of the offences triable by courts-martial, by virtue of this act, and shall come into this realm, or *Ireland*, or into *Jersey*, *Guernsey*, *Alderney*, *Sark*, or *Man*, or the islands thereto belonging, before he be tried by a court-martial for such offence, such officer or soldier shall be tried for the same, as if the said offence had been committed within this realm."

By § 73. in order to prevent all doubts that may arise, in relation to punishing crimes and offences committed against former mutiny acts, it is enacted, "That all crimes and offences, which have been committed against any former mutiny act, shall and may, during the continuation of this present act, be inquired of, heard, tried, and determined, adjudged and punished, before and by the like courts, persons, powers, authorities, ways, means and methods, as the like crimes and offences committed against this present act may be inquired of, heard, tried, determined, adjudged, and punished: and that the proceedings of a court-martial, upon any trial, begun under the authority of such former act, shall not be discontinued by the expiration of the same, but it shall be lawful to proceed to judgment upon such trial, and to carry such judgment into execution, in like manner as if the proceedings had been commenced under the authority of this act."

But by § 74. it is provided, "That no person shall be liable to be tried and punished for any offence against any of the said acts, which shall appear to have been committed more than



“ three years before the issuing of the commission or warrant for such trial ; [unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice within that period ; in which case such person shall be liable to be tried at any time not exceeding two years after the impediment shall have ceased.”]

Only volunteers were formerly liable to be punished by martial law, but by the 30 G. 2. c. 8. § 20. it is enacted, “ That the commissioners, present at a meeting for listing of soldiers, as in this act is before directed, shall cause the second and sixth sections of articles of war against mutiny and desertion to be read to the men impressed by virtue of this act ; and from and after the reading the said articles of war, every person so impressed shall be deemed a listed soldier to all intents and purposes, and shall be subject to the discipline of war ; and in case of desertion, shall be proceeded against as a deserter by any law now in force, or by any law to be made for punishment of deserters.” [This act is expired.]

By the 36 G. 3. c. 24. § 12. it is provided, “ That no officer or soldier, being acquitted or convicted of any offence, be liable to be tried a second time by the same or any other court-martial for the same offence, unless in the case of an appeal from a regimental to a general court-martial, and that no sentence given by any court-martial, and signed by the president thereof, shall be liable to be revised more than once.”

By § 59. it is provided, “ That no person or persons, being acquitted or convicted of any capital crimes, violences or offences by the civil magistrate, shall be liable to be punished by a court-martial for the same, otherwise than by cashiering.”

## (G) Of the Civil Punishments to which Soldiers are liable.

**BY** the 36 G. 3. c. 24. § 13. it is provided, “ That nothing in this act shall extend, or be construed, to exempt any officer or soldier from being proceeded against by the ordinary course of law.”

And by § 60. it is provided, “ That if any officer, non-commission officer or soldier shall be accused of any capital crime, or of any violence or offence against the person, estate, or property of any of his Majesty's subjects, which is punishable by the known laws of the land, the commanding officer or officers of every regiment, troop, company, or party, is and are hereby required to use his utmost endeavours, to deliver over such accused person to the civil magistrate ; and shall also be aiding and assisting to the officers of justice in seizing and apprehending such offender, in order to bring him to trial ; and if any such commanding officer shall wilfully neglect or refuse, upon application made to him for that purpose, to deliver over any such accused person to the civil magistrate, or to be aiding and

“ assisting to the officers of justice in the apprehending such  
 “ offender, every such officer so offending, and being thereof con-  
 “ victed, before any two or more justices of the peace for the  
 “ county where the fact is committed, by the oath of two credible  
 “ witnesses, shall be deemed and taken to be *ipso facto* cashiered,  
 “ and shall be utterly disabled to have or hold any civil or mili-  
 “ tary office or employment within this kingdom, or in his Ma-  
 “ jesty’s service; provided the said conviction be affirmed at the  
 “ next quarter-sessions of the peace for the said county, and a  
 “ certificate thereof be transmitted to the judge advocate, who is  
 “ hereby obliged to certify the same to the next court-martial.”

By the 19 G. 2. c. 21. § 5. it is enacted, “ That in case any  
 “ common soldier, belonging to any regiment in his Majesty’s  
 “ service, shall be convicted of profane cursing or swearing, and  
 “ shall not immediately pay down the penalty by him forfeited,  
 “ or give security for the same, and also the cost of the informa-  
 “ tion, summons, and conviction, as in and by this act is direct-  
 “ ed, every such common soldier, instead of being committed to  
 “ the house of correction, as by this act is directed, shall by the  
 “ said justice, mayor, bailiff, or other head officer, be ordered  
 “ to be publicly set in the stocks for the space of one hour for  
 “ every single offence; and for every number of offences, whereof  
 “ he shall be convicted at one and the same time, two hours.”

By the 39 Eliz. c. 17. § 2. after reciting, that divers lewd and  
 licentious persons, contemning both laws, magistrates and religion,  
 have of late days wandered up and down in all parts of this realm  
 under the name of soldiers, abusing the title of that honourable  
 profession to countenance their wicked behaviours, and do con-  
 tinually assemble themselves in the highways and elsewhere in  
 troops, to the great terror and astonishment of her Majesty’s true  
 subjects, the impeachment of her laws, and the disturbance of  
 the peace and tranquillity of this realm; and that many heinous  
 outrages, robberies, and horrible murders are daily committed by  
 these dissolute persons, and unless some speedy remedy be had,  
 many dangers are like by these means to ensue and grow towards  
 the commonwealth, it is enacted, “ That all idle and wandering  
 “ soldiers, or idle persons, which now are, or hereafter shall be,  
 “ wandering as soldiers, shall settle themselves in some service,  
 “ labour, or other lawful course of life, without wandering, or  
 “ otherwise repair to the places where they were born, or to their  
 “ dwelling places, if they have any, and there remain betaking  
 “ themselves to some lawful course of life as aforesaid, upon pain  
 “ that all persons, offending contrary to this act, to be reputed as  
 “ felons, and to suffer as in case of felony without benefit of  
 “ clergy.”

By § 3. it is enacted, “ That every idle and wandering soldier,  
 “ which, coming from his captain from the seas or beyond the  
 “ seas, shall not have a testimonial under the hand of some one  
 “ justice of the peace of or near the place where he landed, set-  
 “ ting down therein the place and time when and where he land-  
 “ ed,

“ ed, and the place of his dwelling or birth unto which he is to  
 “ pass, and a convenient time therein limited for his passage, or  
 “ having such testimonial shall wilfully exceed the time therein  
 “ limited above fourteen days: and also as well every such  
 “ idle and wandering soldier, as every idle person wandering  
 “ as a soldier, which shall at any time hereafter forge or coun-  
 “ terfeit any such testimonial, or have with him or them any such  
 “ testimonial forged or counterfeited as aforesaid, knowing the  
 “ same to be counterfeited or forged; in all these cases every such  
 “ act or acts to be felony, and the offenders to suffer as aforesaid,  
 “ without benefit of clergy.”

By § 4. it is enacted, “ That it shall be lawful for the justices  
 “ of assize, justices of gaol delivery, and the justices of peace of  
 “ every county, and for all justices of peace of towns corporate,  
 “ having authority to hear and determine felonies, to hear and  
 “ determine all such offences in their general sessions; and to  
 “ execute the offenders, which shall be convicted before them, as  
 “ in cases of felony is accustomed; except some honest person,  
 “ valued at the last subsidy next before the time to ten pounds in  
 “ goods, or forty shillings in lands, or else some honest freeholder  
 “ as by the said justices shall be allowed, will be contented, before  
 “ such justices as such person shall be arraigned of felony, to take  
 “ him or them into his service for one whole year then next fol-  
 “ lowing, and then before the said justices will be bound by re-  
 “ cognizance of ten pounds, to be levied of his lands, goods, tene-  
 “ ments, and chattels, to the use of our sovereign lady the queen,  
 “ if he keep not the said person or persons for one whole year,  
 “ and bring him to the next sessions for the peace and gaol de-  
 “ livery next ensuing after the said year: and if any such person  
 “ retained depart within the year, without the licence of him  
 “ that so retaineth him, then he to be indicted, tried, and  
 “ adjudged as a felon, and not to have the benefit of his  
 “ clergy.”

#### (H) Of the Liberty given to Soldiers of exercising Trades.

BY the 24 G. 3. *sess.* 2. c. 6. § 1. after reciting, that there are  
 divers officers and soldiers who have served his Majesty, some  
 of which are men that used trades, others that were apprentices  
 to trades who had not served out their times, and others who by  
 their own industry have made themselves apt and fit for trades;  
 many of which would willingly employ themselves in those trades  
 which they were formerly accustomed to, or which they are apt  
 or able to follow and make use of; but are or may be hindered  
 from exercising those trades in certain cities or corporations, and  
 other places within this kingdom, because of certain by-laws  
 and customs of those places, and of the statute made in  
 the fifth year of Queen Elizabeth, it is enacted, “ That all  
 “ such

“ such officers and soldiers, who have been at any time employed  
 “ in his Majesty’s service since the first day of *April* 1763, and  
 “ have not since deserted the said service, and also the wives and  
 “ children of such officers and soldiers, may set up and exercise  
 “ such trades as they are apt and able for, in any town or place  
 “ within the kingdoms of *Great Britain* and *Ireland*, without any  
 “ let, suit, or molestation, of any person or persons whatsoever,  
 “ for or by reason of the using such trades; [nor shall such officers  
 “ or soldiers, or their wives or children, during the time they  
 “ shall exercise such trades, be removable from such respective  
 “ place or places, to their last legal place of settlement, until  
 “ such persons shall become actually chargeable to such parish or  
 “ place;] and if any such officer or officers, soldier or soldiers  
 “ shall be sued, empleaded, or indicted in any court within this  
 “ kingdom, for using or exercising any such trade as aforesaid,  
 “ then the said officer or officers, soldier or soldiers, making it  
 “ appear to the same court where they are so sued, empleaded, or  
 “ indicted, that they have served the king’s Majesty as aforesaid,  
 “ [or that he, she, or they, is or are the wife or wives, child or  
 “ children of such officer or officers, soldier or soldiers, who shall  
 “ have so served,] shall upon the general issue pleaded be found  
 “ not guilty in any plaint, bill, information, or indictment ex-  
 “ hibited against them; and such person or persons, who notwith-  
 “ standing this act shall prosecute their said suit by bill, plaint,  
 “ information, or indictment, and shall have a verdict pass against  
 “ them, or become nonsuit therein, or discontinue the said suit,  
 “ shall pay unto such officer or officers, soldier or soldiers, [or the  
 “ wife or child of such officer or soldier,] double costs of suit, to  
 “ be recovered as any other costs at common law may be reco-  
 “ vered; and all judges and jurors, before whom any such suit,  
 “ information, or indictment shall be brought, and all other per-  
 “ sons whatsoever, are to take notice of this act, and shall con-  
 “ form themselves thereunto; any statute, law, ordinance, custom,  
 “ or provision to the contrary in anywise notwithstanding.”

[By § 4. this act is extended to all officers and soldiers who have been drawn by ballot, and have personally served in the militia, or any fencible regiments, from the 1st day of *April* 1763, for the term of three years, and have been honourably discharged.]

By 22 *G. 2. c. 44.* § 2. it is provided, “ That this act shall not  
 “ in anywise be prejudicial to the Universities of *Oxford* or *Cam-*  
 “ *bridge*, or either of them; or extend to give liberty to any per-  
 “ son to set up the trade of a vintner, or to sell any wine or other  
 “ liquors, within the said universities, without licence had and  
 “ obtained from the vice-chancellours of the same respectively.”

[But this exception does not appear in the above act of 24 *G. 3. sess. 2. c. 6.* However, in the general militia act of 26 *G. 3. c. 107.* it is referred to in the section which authorizes militia men, who have been drawn out into actual service, being married, to exercise trades.]

In an action *qui tam* for exercising the trade of a fadler it appeared, that the defendant, who had not served an apprenticeship to that trade, had been one of the *Blackwell Hall* volunteers who associated themselves during the late rebellion; and that, by one article of their association, they were not to put themselves under the command of any officer appointed by his Majesty, or to be subject to military discipline, until the rebels came within sixty miles of *London*. As this never did happen, and consequently they were never in fact under the command of any officer appointed by his Majesty, or subject to military discipline, the question was, Whether the defendant did thereby acquire a right under the 22 G. 2. c. 44. of exercising the trade of a fadler? It was holden that he did not; and by Lord *Mansfield*, Ch. J. — We should have been glad to have found the present defendant within the meaning of the statute of the twenty-second of the king: but that statute does only extend to such as have been soldiers; and no man is to be deemed a soldier, unless he has been actually enlisted, and had the articles of war read to him.

MS Rep.  
Mott v.  
Williams,  
East. 31 G. 2.  
in K. B.

### (I) Of divers Things, which did not fall under any of the foregoing Heads.

**BY** the 5 W. & M. c. 21. and by the 9 & 10 W. 3. c. 25. § 19. it is provided, "That nothing in these acts contained shall extend to charge the probate of any will or letters of administration of any common soldier, who shall be slain or die in his Majesty's service, a certificate being produced from the captain of the troop or company, under whom such soldier served at the time of his death, and oath made of the truth thereof, before the proper judge or officer by whom such probate or administration ought to be granted; which oath such judge or officer is hereby authorized and required to administer, and for which no fee or reward shall be taken."

By the 43 Eliz. c. 3. § 2. it is provided, That every parish shall be charged with a weekly sum for the relief of sick, hurt, and maimed soldiers, and there are in the same act directions for applying the money raised for this purpose: but as the practice is at this day, to leave such soldiers to be provided for by the respective parishes to which they belong, it is unnecessary to mention those directions.

The ancient method of taxing parishes, for the relief of soldiers, is now disused.

By the 36 G. 3. c. 24. § 33. it is enacted, "That it shall and may be lawful for any two justices of the peace for the county, town, or place where any non-commission officer or soldier shall be quartered, in case such non-commission officer or soldier have either wife, or child, or children, to cause such non-commission officer or soldier to be summoned before them in the town or place where such non-commission officer or soldier shall be quartered, in order to make oath of the place of their last legal settlement, (which oath the said justices are hereby empowered to administer;) and such non-commission officers and

[(a) The original examination is evidence, as well as the attested copy, Rex v. Warley, 6 Term Rep. 534. but no other attested copy besides this which the act prints out is admissible, Rex v. Clayton Le Moors, 5 Term Rep. 704.]

“ private soldiers as aforesaid are hereby directed to obey such  
 “ summons, and to make oath accordingly: and such justices are  
 “ hereby required to give an attested copy of such affidavit, so  
 “ made before them, to the person making the same, to be by him  
 “ delivered to his commanding officer, in order to be produced,  
 “ when required; which attested copy shall be at any time ad-  
 “ mitted in evidence (a) as to such last legal settlement, before  
 “ any of his Majesty’s justices of the peace, or at any general or  
 “ quarter sessions of the peace: provided always, that in case any  
 “ non-commission officer or soldier shall be again summoned to  
 “ make oath as aforesaid, then on such attested copy of the oath  
 “ by him formerly taken being produced by him, or by any other  
 “ person on his behalf, such non-commission officer or soldier  
 “ shall not be obliged to take any further oath, with regard to his  
 “ last legal settlement, but shall leave a copy of such attested copy  
 “ of examination, if required.”

By § 53. it is enacted, “ That if any person shall knowingly de-  
 “ tain, buy, or exchange, or otherwise receive any arms, clothes,  
 “ caps, or other furniture, belonging to the king, from any soldier  
 “ or deserter, or any other person, upon any account or pre-  
 “ tence whatsoever, or cause the colour of such clothes to be  
 “ changed, the person so offending shall, for every such offence,  
 “ forfeit the sum of five pounds; and upon conviction, by the  
 “ oath of one or more credible witness or witnesses, before any of  
 “ his Majesty’s justices of the peace, the said penalty of five  
 “ pounds shall be levied by warrant, under the hands of the said  
 “ justice or justices of the peace, by distress and sale of the goods  
 “ and chattels of the offender; and in case any such offender,  
 “ who shall be convicted as aforesaid, shall not have goods and  
 “ chattels whereon distress may be made to the value of the  
 “ penalty recovered against him for such offence, or shall not pay  
 “ such penalty within four days after such conviction, then, and  
 “ in such case, such justice of the peace shall and may, by warrant  
 “ under his hand and seal, either commit the offender to the  
 “ common gaol, there to remain without bail or mainprize for  
 “ the space of three months, or cause such offender to be pub-  
 “ licly whipped, at the discretion of such justice.”

Ld. Raym.  
 101.  
 Beaumont v.  
 Pine.

It is said, that, as an agent of a regiment is but a servant to the colonel, his receipt can only charge the colonel; there being no privity between the king and him.

Ld. Raym.  
 312.  
 Taylor v.  
 Jones.

In an action of *assumpsit* the plaintiff declared, that he was and yet is captain of a company of soldiers, and that the defendant, in consideration that the plaintiff would permit *A. B.* a soldier in his company to be absent ten days, promised the plaintiff to bring back the said *A. B.* at the end of ten days, or to pay him twenty pounds: it was objected, that there is not in this case any consideration to support the action; for that the captain of a company has not such property in a soldier thereunto belonging, as to give him leave to absent himself from the king’s service: but by the court—When a captain has no occasion to employ a soldier in the king’s

king's service, he may give him leave to be absent for a reasonable time, such leave being a benefit to the soldier.

A lease being forfeited for the non-payment of rent, the lessor brought an ejectment. Hereupon a rule was made, that, upon the defendant's bringing into court what was due for rent, with costs, the proceedings in ejectment should be staid: but the lessor afterwards obtained another rule for discharging this, unless the defendant, who was a soldier, and therefore entitled to privilege, would give security for the payment of the rent.

10 Mod.  
383.  
Smith v.  
Perkins.

## Stamps.

**A** Stamp is a mark affixed to certain instruments, writings, and things.

The use of this mark is to denote, that the duty imposed upon the instrument, writing, or thing, has been paid, or that security has been given for the payment thereof.

[The stamps depend upon a great variety of acts of parliament, the introduction of which into a work of this kind, the editor conceives, would only increase its bulk and its price, without adding to its intrinsic value. Some of those acts were inserted very much at length under this division in the former editions of this work; but they are now withdrawn, and the editor has merely stated the few adjudications he has been able to collect upon the subject.]

Upon a trial at bar of an information in the nature of a *quo warranto*, an instrument stamped with one stamp was offered in evidence, purporting to be the admission of five persons upon the nineteenth of *December* one thousand seven hundred and twenty-one, amongst whom the defendant was the third person named. *Raymond*, Ch. J. and *Fortescue* and *Reynolds*, J. were of opinion, that the instrument ought not to be read; for that if not quite void for uncertainty, it could be only good for the admission of the person first named (*a*). Then four pieces of parchment, all duly stamped, which purported to be the several admissions of the four persons last named on the said nineteenth day of *December*, were offered in evidence: but it being proved by the witness producing them, that they were not stamped till two months after the said day, the same three judges were of opinion, that as these parchments were not stamped at the time of the admission, they could not be given in evidence, because no certificate of the payment of the penalties was produced.

Ld. Raym.  
1445.  
Rex v.  
Reeks.  
[(a) See acc.  
Doug. 217.  
And in the  
case of *Gilby*  
*v. Lockyer*  
there re-  
ported, it  
was adjudg-  
ed, that two  
or more de-  
fendants  
cannot be  
helden to  
bail upon  
one affidavit,  
as being a  
fraud upon  
the stamp  
duties.]

Upon a writ of error it appeared from a bill of exceptions, that a patent, which had been given in evidence, was not stamped at

Str. 624.  
Rex v. the  
Bishop of

Chester.  
(a) 5 & 6  
W. 3. c. 21.

the time it was sealed : and the question was, Whether the patent ought to have been admitted as evidence ? The whole court were of opinion, that being stamped at the time of the trial, it was admissible evidence ; for that the intention of the stamp act (a) is not to make unstamped deeds absolutely void, but to add a penalty, which has in the present case been paid, for enforcing the payment of the stamp duty.

8 Mod.  
226.  
Anon.  
Str. 575.

A motion was made to set aside a verdict because a *disfringas* was not stamped at the time of the trial ; but the solicitor having taken care to get it stamped before the *poslea* was brought in, no rule was made ; and by the court—As the *disfringas* is now stamped, we cannot take notice whether it were so or not at the assize ; and if it were not, advantage should have been then taken of the defect.

Str. 903.  
The Inhabitants of  
Curenden v.  
the Inhabitants of I.e-  
land. [Vide  
Rex v. Hol-  
beck, Burr.  
S. C. 198.  
Rex v. Lan-  
vair Duffryn  
Clwyd. Id.  
236. S. P.  
But where  
the consider-

An apprentice had served three years : but the master had never paid the duty of six-pence in the pound for the money received with him. This case being referred to *Fortescue*, J. who went the circuit, he was of opinion, that as six months' time was given for the master to pay the duty in, a settlement was during that time gained which could not afterwards be defeated ; and the sessions held it to be a settlement. Upon removing the order of sessions, it was quashed ; and by the court—This would be making the indenture good to one purpose, when by the 8 of *Ann. c. 9.* it is declared, that such indenture shall not be good to any purpose whatsoever ; and the positive words of an act of parliament, however hard the case is, are not to be broke through.

ation-money is under 20 s. *Baxter v. Faulm*, 1 Wils. 129. *Rex v. Yarmouth*, Burr. S. C. 379. where, in the case of a voluntary binding, it is paid by the parish officers, (for in that case it comes within the exception in the fortieth section of the act, as *being at the publick charge of the parish*) ; where it is given to any one else than to the master or mistress : *Rex v. St. Petrox* in Dartmouth, 4 Term Rep. 196. or where the thing contracted for is not in lieu of money or premium to the master or mistress, *Rex v. Leighton*, 4 Term Rep. 732. the stamp under this act is not necessary.]

Rex v. St.  
Paul's Bed-  
ford, 6 Term  
Rep. 452.

[By the act of 23 G. 3. c. 58. which imposes a 6s. stamp upon agreements, it is provided, that it shall not extend to "any memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant, or to any memorandum or agreement, where the matter of the memorandum or agreement does not exceed the sum of 20 l." It was holden, that an agreement for the assignment of an apprentice, from one master to another, was not within this proviso, but that it must be stamped as required by the act.]

Salk. 612.  
Anon.  
Mich.  
4 Ann.

A warrant of attorney for entering up judgment was written upon a sheet of paper, which likewise contained a bond, and had only one stamp ; whereas by the statutes imposing stamp duties it ought to have had two. Judgment having been entered up by virtue of this warrant, the court was moved that the judgment and execution thereupon might be set aside : but by the court—There may be reason to refuse such warrant of attorney in evidence, but there is none to hold it void ; for there is nothing in either of the stamp acts which makes it so.

This, which is an anonymous case, is very shortly reported ; and there was probably some other reason for the judgment ; for that



that mentioned by the reporter is so inconclusive, that the judgment of the court cannot be presumed to have been thereupon founded. It is not easy to conceive a case, wherein such warrant of attorney could have been offered in evidence; but to allow the possibility of such a case, if the court would have been of opinion, that it would not have been admissible evidence, the judgment entered up upon it seems to be bad: for in the clause of the 5 & 6 of *W. & M. c. 21.* and of the 9 & 10 *W. 3. c. 25.* in which it is enacted, *That no deed, instrument, or writing shall be pleaded or given in evidence in any court, until the vellum, parchment, or paper on which such deed, instrument, or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp, it is added, or be admitted in any court to be good, useful, or available in law or equity.*

Upon debate it was holden, that an absolute rule should be made in the first instance for judgment for five pounds, for not having filed common bail according to the 9 & 10 *W. 3. c. 25.* the words of the statute being, that the court shall immediately award judgment, whereupon the plaintiff may take out execution.

Str. 737.  
White v.  
Holland.

[In ejectment, the plaintiff offered to give in evidence an examined copy of a bill in Chancery, contained in two close sheets of paper, each stamped with treble six-penny stamps; but the matter was equal in quantity to forty office-copy sheets: and also an examined copy of an amended bill, in three close sheets, each stamped with a treble six-penny stamp, the matter whereof would have extended to sixty office-copy sheets. By the stamp act, 9 & 10 *W. 3. c. 25. § 64.* every copy of proceedings in Chancery is charged with a duty of three-penny stamps on each sheet; otherwise, it cannot be given in evidence. And it is also provided, that all proceedings in any court shall be written in the usual manner. A verdict being obtained for the plaintiff, subject to the opinion of the court, whether this evidence ought to have been admitted, it was insisted for the defendant, that the copy meant by the statute was an office-copy. But by Lord Mansfield —When stamps were originally imposed, there were two kinds of copies in common use: one an office-copy, to be made use of in the court to which the cause belonged. This contained only a stated number of words, by immemorial custom, probably introduced to enlarge the fees of the officers. The other, a common close copy to be used, when proved in any other court or place. Then comes the act, and lays (in one clause) a duty upon every sheet of copy; and the next clause directs all proceedings in any court to be written in the same manner as before. Is this latter clause a legislative provision that the office-copies only shall be used in evidence, where they were not used before? It is not to be conceived, that in order to raise so small a duty, (for originally it was only 1*d.* a sheet,) the legislature intended to put the parties to the expence of 60*l.* to take office-copies, merely to give in evidence. The stamp acts have not always been construed strictly. It has been determined that the stamp duties do not extend

1 Bl. Rep.  
288.  
2 Burr.  
1177.

extend to proceedings before either house of parliament.—The postea was delivered to the plaintiff.

Stonelake v.  
Babb,  
5 Burr.  
2673.

By 1 *Ann. st. 2. c. 22. § 2.* it is enacted, “ That if any person shall write, or cause to be written, part of any writ, mandate, bond, affidavit, or other writing, in respect whereof any duty is payable, on any piece of vellum, &c. whereon there shall have been before written any other writ, &c. in respect whereof any duty is payable, before such vellum, &c. shall be again stamped; or shall fraudulently erase the name of any person, or any sum, date, or other thing, or cut off any stamp from any piece of vellum, &c. with intent to use such stamp for any other writing, in respect whereof any duty shall be payable; every person so offending shall forfeit 20*l.* with costs.” In an action for the penalty under this act, it was adjudged, that it was incurred by the erasure of names and dates out of a letter of attorney that had been granted by the defendant to collect debts in *Newfoundland*, and the insertion of others, without getting the instrument restamped.

Bowman v.  
Nichol,  
5 Term Rep.  
537.

A bill of exchange was drawn on a proper stamp, dated 2d *September*, payable 21 days after date. It was afterwards altered, and made payable 51 days after date; and on 30th of *September*, it was again altered to 21 days after date, and the date was brought forward to the 14th of *September*. It was determined, that at the time when the last alteration was made, there ought to have been a new stamp, the operation of the bill, as it originally stood, being then quite spent; and this being quite a new and distinct transaction between the parties.

Curry v.  
Edenfor,  
3 Term Rep.  
524.

The plaintiff, through the medium of the defendant, his broker, had made two purchases of cotton; and the defendant engaged to indemnify the plaintiff from any loss on the resale of them. At the trial, the plaintiff gave parol evidence of this contract of indemnity; and for further proof, called upon the defendant to produce his book, wherein he had entered a minute of the contract for the purchase of the cotton, with the letter G. at the bottom, which was explained to signify *guarantee*. It was objected, that this entry ought to have been stamped by virtue of the 23 *G. 3. c. 58.* which requires a stamp on every piece of paper whereon any agreement shall be written, whether the same be only evidence of the contract, or obligatory upon the parties from its being a written instrument. But the court held, that the entry required no stamp; for that it came within the exception in the fourth section of that act, whereby it is provided, that it shall not extend to any memorandum, letter, or agreement, made for or relating to the sale of any goods; under which latter description this contract fell.

Mackenzie  
v. Banks,  
5 Term Rep.  
176.

In an action on the defendant's undertaking to pay the debt of his mother who was in trade, it appeared, that the debt arose in the course of her business, which the defendant assisted her in carrying on, though without any share in it. The evidence of the undertaking was a letter written by the defendant to the plaintiff. The question was, Whether the letter ought to have been stamped.

stamped, as all agreements in writing are required to be by the above act of 23 G. 3. c. 58. or, whether the letter came within the exception of 32 G. 3. c. 51. § 1. whereby it is provided, " That the said act shall not extend to make liable to the stamp duty any letter passing by the post between merchants or other persons carrying on trade or commerce in this kingdom, residing at 50 miles distance from each other." The court held, that as it appeared that the defendant did carry on the business for his mother, and this debt arose in the regular course of trade, any letter written by him on account of that very trade, whereby he bound himself to another tradesman, might fairly be construed to fall within the letter and spirit of the last act, which meant that the correspondence of merchants and tradesmen at a distance from one another, on the faith of which they had considerable dealings, should not be fettered with stamps.

A written agreement in these words, " A. doth let and sell to B. for the term of three years," &c. was offered in evidence in an action of *assumpsit* on a special agreement. The defendant objected to its being read, because it was a lease, and was not stamped. For the plaintiff it was said, this was only a memorandum of a parol lease, which, being for three years only, is good as such, and that the statute in using the words " indenture, lease, or deed-poll," meant only deeds. But it was holden, that though a parol lease for three years is good, yet, if a man, through caution, will reduce it into writing, he must pay for the stamp; otherwise the court are inhibited from receiving it in evidence.

By an act which has just passed for more effectually securing the stamp duties on indentures, leases, bonds, and other deeds, a penalty of twenty pounds is imposed upon any attorney, solicitor, clerk, officer, or other person, who shall engross, print, or write any indenture, lease, bond, or other deed, on vellum, parchment, or paper, not duly stamped according to the directions of that act, and who shall neglect to bring the same to be duly stamped within the time thereby directed and allowed; and no such indenture, lease, bond, or other deed, shall be pleaded or given in evidence, or be good, useful, or available in any manner whatever, unless the same shall be stamped as required by that act.

It was holden by all the judges of *England*, that in an indictment for forging a bill of exchange, the instrument need not be stamped in order that it may be received in evidence, though the statute of 23 G. 3. c. 29. which imposes the duty, expressly says, that no bill of exchange shall be received in evidence, unless it be first duly stamped.

Where the legislature have appropriated a stamp to any particular form of instrument, a substitution of another stamp, though of equal value, will not give validity to such instrument; for as long as a distinction of the several stamps is preserved by the legislature, it must be adhered to by the courts of justice. Hence articles of agreement, under seal, stamped with an agreement stamp, were holden to be inadmissible in evidence, though the

*Proffer v. Phillips, Hereford, Summer Assizes 1765, coram Perrott, B. Bull. Nî. Pri. 269. Hearne v. James. 2 Br. Ch. Rep. 309. S. P. 37 G. 3. c. 19. § 3.*

*Rex v. Hawkeswood, cited by Buller, J. in 2 Term Rep. 606.*

*Robinson v. Drybrough, 6 Term Rep. 317.*

the agreement stamp which they bore was of the same value with the stamp which they required, *viz.* a deed stamp.

See further *tit. Agreement*, Vol. 1. 124-5.]

## Statute.

*Per* Wilmot,  
C. J. 2 Wilf.  
348.  
(a) Hale's  
Hist. of the  
Com. Law,  
66.

1 Reeves's  
Hist. Engl.  
Law, 215.

[THE statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing. For many (a) of those things that we now take for common law, were undoubtedly acts of parliament, though not now to be found of record.]

Indeed our lawyers have made a distinction between statutes themselves; they have distinguished between statutes made before the time of legal memory, *viz.* 1 R. 1. and those made since. The former are considered as part of the common law, the *leges non scriptæ*; for notwithstanding copies of them may be found, their provisions obtain at this day, not as acts of parliament, but by immemorial usage and custom. The latter, or those since time of memory, are again distinguished; those from 1 R. 1. to E. 3. are called *antiqua statuta*: and all subsequent statutes are called *nova statuta*.]

[(b) It would be more correct to say, A statute is a written law, made by the king and two houses of parliament (b).  
“By the king, with the advice and consent of the two houses of parliament.”]

Hatton on  
the Statutes,  
p. 2. &c.

[An act of parliament is a law agreed upon by the king or queen of *England*, having regal authority, the lords spiritual and temporal, and the commons, lawfully assembled; which taketh strength and life by the assent royal; so that the rest of the consents may be accounted to be parcel of the substance, and the royal assent to be *forma interna et informans, quæ dat rei esse*.

2 Atk. 654.  
*per* Lord  
Hardwicke,

No new laws can be made to bind the people of this land, but by the king, with the advice and consent of both houses of parliament, and by their united authority; neither the king alone, nor the king, with the concurrence of any particular number or order of men, have this high power.

*Ibid.*

The binding force of these acts of parliament ariseth from that prerogative which is in the king, as our sovereign liege lord; from that personal right which is inherent in the peers and lords of parliament, to bind themselves, and their heirs and successors, in their honours and dignities; and from the delegated power vested

vested in the commons as the representatives of the people. And therefore Lord *Coke* saith, 4 *Inst.* 1. these represent the whole commons of the realm, and are trusted for them. By reason of this representation, every man is said to be party to, and the consent of every subject is included in an act of parliament:—And though it be undoubtedly true, that many amongst the commons have no votes, as persons having no freehold, freeholders in the ancient demesne, women, &c., yet that does not make it cease to be an actual representation of the people. Nobody ever imagined, that, in exercising a right of this kind, every person could possibly join, but some rule of qualification must be laid down, and that hath been taken from the most worthy, and such as have the most valuable and fixed sort of property; which also, to avoid confusion, hath been restrained by later acts of parliament.]

The manner of passing bills in parliament has been shewn under the title Court of Parliament.

The remainder of what falls under this title shall be considered in the following order:

- (A) Of some Things necessary to the Validity of a Statute.
- (B) Of some Things incidental to a Statute.
- (C) From what Time a Statute begins to have Effect.
- (D) How long a Statute continues in Force.
- (E) Of the vast Power of a Statute.
- (F) Of a publick or private Statute.
- (G) Of an affirmative or negative Statute.
- (H) Whose Province it is to construe a Statute.
- (I) Rules to be observed in the Construction of a Statute.
  - 1. Words and Phrases, the Meaning of which in a Statute has been ascertained, are when used in a subsequent Statute to be understood in the same Sense.
  - 2. In the Construction of one Part of a Statute every other Part ought to be taken into Consideration.
  - 3. If divers Statutes relate to the same Thing, they ought to be all taken into Consideration in construing any one of them.
  - 4. The common Law ought to be regarded in the Construction of a Statute.
  - 5. The Intention of the Makers of a Statute ought to be regarded in the Construction of the Statute.
  - 6. In what Cases a Statute ought to have an equitable Construction.

7. A Statute which concerns the publick Good ought to be construed liberally.
8. A remedial Statute ought to be construed liberally.
9. A penal Statute ought to be construed strictly.
10. Some other Rules, which ought to be observed in the Construction of a Statute.

(K) How a Person guilty of Disobedience to a Statute may be punished.

(L) Of pleading a Statute.

1. A publick Statute.
2. A private Statute.
3. Some general Rules for pleading a Statute.
4. Some Rules for pleading a Statute, which relate to particular Parts of the Pleadings.
5. Of Misrecital in pleading a Statute.
6. Of Surplusage in pleading a Statute.

(A) Of some Things necessary to the Validity of a Statute.

2 Inst. 585: **I**T has been said, that a parliament may be holden without summoning the lords spiritual thereto: but the better opinion is, that they ought to be summoned; because they have by the law and custom of parliament as good a right to sit in the House of Lords as the lords temporal.

*Ibid.* If the spiritual lords, after having been summoned, voluntarily absent themselves, the king, lords temporal, and commons may make a statute without them.

2 Inst. 585, 586. This is constantly the case, where a bill is brought into parliament for attainting a person. The lords spiritual are forbidden by the canon law to be present at the passing of such bill; yet, if the bill do pass, it is a valid statute (a).

[*(a)* It is remarkable, that though the bishops always decline to vote on acts of attainder, yet most of those acts make express mention of the lords spiritual. *Vide* st. 16 Car. 1. c. 1. in Russw. tr. Strafford, 756-7. and the act for attainting Sir John Fenwick, 8 W. 3. c. 4. in 5 St. Tr. 44. 4th edit.]

*Ibid.* If the spiritual lords, being present, refuse to give their assent to or protest against the passing of a bill, yet, if the bill do pass, it is a valid statute.

4 Inst. 516. Two bills being read in parliament, one intituled (b), *A confirmation of the statute of provisors, and the forfeiture of him that accepteth a benefice against that statute*; the other intituled (c), *The penalty of him that bringeth a summons or sentence of excommunication against any person upon the statute of provisors, and of a prelate executing it*; both which tended to restrain the authority claimed by the pope of disposing of ecclesiastical benefices within this realm, the Archbishops of Canterbury and York, in the name of the whole clergy of their provinces, made a solemn protestation in open parliament, that they

would in nowise assent to any law in restraint of the pope's authority. This protestation was, at their request, enrolled; yet both bills were passed by the king, lords temporal, and commons, and are among the printed statutes.

As all votes in parliament, whether in the affirmative or in the negative, ought to be absolute, if the bishops annex any condition to their votes, their votes are void, and the statute is good without their concurrence. 2 Inst. 583.

A bill was brought into parliament in the time of Henry the Sixth, *That no man should contract or marry himself to any queen of England without the special licence and assent of the king, on pain of losing all his goods and lands.* The bishops and clergy assented thereto, *as far forth as the same swerveth not from the law of God and the church; and so as the same importeth no deadly sin.* This was holden to be no assent, and it was specially entered, that the statute was enacted by the king, lords temporal, and commons. Rot. Parl. 6 H. 6. n. 27. 2 Inst. 587.

Notwithstanding it be specially entered in the parliament roll, that a statute was enacted by the king, lords temporal, and commons, it is not to be inferred that the prelates were not summoned to parliament: but it must be intended that they voluntarily absented themselves; or refused to give their assent to, or protested against, the passing of a bill; or gave such votes as were *contra legem et consuetudinem parliamenti.* 2 Inst. 583. 587.

Some ancient statutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning either lords or commons, and some others have only the general words, *It is provided, or It is ordained*, without saying by whom: but as these have constantly been received as statutes, the presumption is, that they were made by lawful authority. Hawk. Pref. to the Stat. 1 Inst. 93. [Vide Reeves's Hist. Engl. Law, vol. 1. 215. vol. 2. 354. vol. 3. 143. 252. 379.]

The mode of stating the enacting authority hath varied exceedingly at different periods; but the present correct style hath uniformly obtained from the 13 Car. 2.—In the famous act of Tonnage and Poundage, 12 Car. 2. c. 4. it is remarkable that the enactment is not stated to be by the royal authority. The language of the act is, *by the commons, by and with the advice and consent of the lords in this present parliament assembled.* Perhaps, as the statute was to convey an interest to the crown, the framers of it might think the royal assent was sufficiently implied.]

The difference, according to Lord Coke, between a statute and an ordinance is, that the latter has not had the assent of the king, lords, and commons, but is made by only one or two of those powers. 4 Inst. 25.

Mr. Prynne, in his remarks upon this passage, says, there is no such difference, nor any difference between a statute and an ordinance. To prove this, he produces more than a hundred printed statutes, in which the words *act* and *ordinance* are used indifferently or coupled together as synonymous terms. He likewise cites a clause, contained in all writs for electing knights, citizens, and burgesses to parliament, which runs thus, *ad faciendum et consentiendum hijs que de communi concilio regni nostri contingerint ordinari*; and infers, that some acts of parliament have been called ordinances from the word *ordinari* in this clause. Prynne's Animadv. on 4 Inst. 13. Prynne's Irenarch. Redeviv. 27 to 44. [See farther on this subject Hargr. 203 Buzl. Co. Litt. 159. b. note; Whitlocke

on the Writ of Parliament, vol. 2. 294.; Elsyng on Parliaments, 18. and Barrington's Observations on the more Ancient Statutes, p. 46.—With regard to the PARLIAMENTARY FORM of enacting laws, thus much seems to be agreed; that where the proceeding consisted only of a petition from parliament,

and an answer from the king, these were entered on the PARLIAMENT ROLL; and if the matter was of a publick nature the whole was then usually styled an ORDINANCE: if, however, the petition and answer were not only of a publick, but a novel nature, they were then formed into an ACT by the king, with the aid of his council and judges, and entered on the STATUTE ROLL. Many instances of these distinctions are to be found upon the rolls of parliament. See 22 E. 3. n. 20. 30. vol. 2. p. 203. Rot. Parl.—28 E. 3. n. 16. vol. 2. p. 257.—37 E. 3. n. 39. vol. 2. p. 280.—and 1 R. 2. n. 56. vol. 3. p. 17. Hargr. and Buil. Co. Litt. *ubi sup.* and 3 Reeves's Hist. Engl. Law, 146. An ordinance on the parliament roll, with the king's assent upon it, has nevertheless equal force with a statute: and a *repectuatur* entered upon the roll in no degree lessens its authority. See ft. 11 H. 4. n. 28. cited and admitted in evidence on Lord Macclesfield's trial, St. Tr. vol. 6.—See The Report from the committee upon temporary laws, expired or expiring.]

8 Rep. 118. If a statute be against common right or reason, or repugnant, or Bonham's impossible to be performed, the common law shall controul it, and case. adjudge it to be void.

2 Inst. 527. Finch, 74. ["Acts of parliament that are impossible to be performed, are of no validity: and if "there arise out of them, collaterally, any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament, contrary to reason, are void. But, if the parliament will positively enact a thing to be done which is unreasonable, "I know of no power in the ordinary forms of the constitution that is vested with authority to controul it; and the examples usually alleged in support of this sense of the rule do none of them prove, that "where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were "to set the judicial power above that of the legislature, which would be subversive of all government. "But, where some collateral matter arises out of the general words, and happens to be unreasonable; "there, the judges are in decency to conclude, that this consequence was not foreseen by the parliament, "and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. "Thus, if an act of parliament gives a man power to try all causes that arise within his manor of Dale; "yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive "it possible for the parliament to enact, that he should try, as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such "evident and express words, as leave no doubt whether it was the intent of the legislature or no." 1 Bl. Comm. 91.]

Hob. 87. It has been holden, that a statute contrary to natural equity, as to 8 Rep. 118. *make a man judge in his own cause* is void; for that *jura naturæ sunt immutabilia*.

10 Mod. But it is said in another case wherein this case is cited, that the 115. judges will not hold a statute to be void, unless it be clearly contrary to natural equity; for that they will strain hard rather than 11 Co. 63. hold a statute to be void.

2 Inst. 526. Before the art of printing was introduced into England all statutes 644. were at the end of every session of parliament transcribed on parchment, and sent to the sheriff of every county, and with them a writ from the king, commanding him to proclaim them throughout his bailiwick (a). After he had proclaimed them, which was usually done in the county court, the transcripts were there deposited, that any person might read or take copies of them.

4 Inst. 26. The last proclamation writ to be found upon the statute rolls in the Tower, bears date 8 Rich. 2. viz. in the year 1385.—See Report from the committee for promulgation of the statutes, p. 5, 6.]

2 Inst. 526. But a statute was even at the time when this laudable practice prevailed equally binding, although it had not been so proclaimed (b). [8] Ordinances were

never promulgated in this manner; but it was sometimes recommended by the king to the Commons (probably by a *charter* or *patent*) to publish them in their counties. 3 Reeves's Hist. Eng. Law, p. 147.]



It has been holden, that the title of a statute is no part of the statute; because this is usually framed by the clerk of that house in which the bill first passes; and is seldom read more than once (a).

3 Rep. 33.  
Poulter's  
case, Hard.  
324. Lord  
Raym. 77.  
[(a) How-

ever, as arguments are frequently drawn from the title of a statute, it is to be wished, that there was a little more attention to the settling of it. For example, who would expect to find a most material alteration of the statute of *Distributions*, in a law, the title of which is, *An act for the renewal and continuance of several acts of parliament*? 1 Ja. 2. c. 17. § 8. or in an act, the title of which is, *An act to enforce the execution of an act of this session of parliament, for granting to his Majesty several rates and duties upon houses, windows, or lights*, to find a provision, that all existing, and all future statutes which mention England, shall also extend to Wales and Berwick-upon-Tweed, though not particularly named? 20 G. 2. c. 42. § 3. It becomes indeed impossible, when statutes relate to matters of a very miscellaneous nature, that the title can be co-extensive with the views of the legislature: it is, therefore, to be wished, that such acts of parliament were distinct laws, and not thrown together in that very strange confusion, which hath now obtained the name of a *badge-podge* act. Barrington's Observations on the more Ancient Statutes, p. 449. See an instance of one of these acts in 17 G. 2. c. 40.]

The custom of prefixing titles to statutes did not begin till about the eleventh year of the reign of Henry the Seventh (b).

Ld. Raym.  
77. Chance  
v. Adams.

Hard. 324. [(b) Instances have, however, occurred before this time. Barrington's Observations on the more Ancient Statutes, p. 449. *notis.*]

The preamble of a statute usually contains the motives and inducements to the making of it: but it has been holden, that it is no part of the statute.

6 Mod. 62.  
Mills v.  
Wilkins.  
8 Mod. 144.

## (B) Of some Things incidental to a Statute.

WHEREVER the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law.

1 Inst. 235.  
2 Inst. 222.

If an offence be made felony by a statute, such statute does by necessary consequence subject the offender to the like attainder and forfeiture, and does require the like construction, as to those who shall be accounted accessaries before or after the fact, and to all other intents and purposes, as a felony at the common law does.

1 Hawk.  
c. 41. § 4.  
3 Inst. 47.  
49, 50.

Misprision of felony is as well incidental to a felony created by a statute as to one at the common law.

1 H. H. P. C.  
652.

Wherever a power is given by a statute, every thing necessary to the making of it effectual is given by implication: for the maxim is, *Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*

12 Rep. 130,  
131.  
2 Inst. 306.

If an action of waste should now be given by a statute against tenant in tail after possibility of issue extinct, treble damages would, although not mentioned, be recoverable: for such damages are recoverable under a former statute, by which an action of waste is given; and wherever an old action is given in a new case, all that before appertained to the action is likewise given.

Bro. Waste,  
pl. 68.

## (C) From what Time a Statute begins to have Effect.

1 Roll. Abr. 465. **E**VERY statute begins to have effect, unless some other time be appointed, from the first day of that session of parliament in which it is made.

Bro. Relat. pl. 35. Bro. Parl. pl. 86. 4 Inst. 25. 27. Hob. 309. Sid. 310. [6 Br. P. C. 553; 4 Term Rep. 66c.] This doctrine, that where the commencement of an act was not directed to be from any particular time, it should commence from the first day of the session of parliament in which it passed, though often productive of the most provoking injustice, was sanctioned by so many decisions, that the interference of the legislature was necessary to controul it. It is therefore enacted, that the clerk of the parliament, shall indorse (in English) on every act, the time it receives the royal assent; which indorsement shall be taken to be a part of the act, and to be the date of its commencement, where no other is provided. St. 33 G. 3. c. 13.]

Ld. Raym. 371. But, where a particular time for the commencement of a statute is appointed, it only begins to have effect from that time:  
Rex v. Gale.  
Plow. 79. Bro. Parl. pl. 86. Hob. 222.

1 Jo. 22. If two statutes relative to the same subject are made in the same  
Standen v. session of parliament, and no time is fixed for the commencement  
The Uni- of either, neither shall have priority: for both have relation to the  
versity of same day and instant of time; and they shall, although contained  
Oxford. in two chapters, be construed as if they had been only one sta-  
[See now tute.  
the above statute of  
23 G. 3.]

It is in the general true, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of parliament is, that *nova constitutio futuris formam debet imponere non præteritis*.

2 Mod 310. A treaty of marriage being on foot between the plaintiff and a  
Gilmore v. person whom he afterwards married, and had 2000 l. with, as a  
The Execu- portion, Shooter, who was of kin to the plaintiff, promised to  
tors of give him as much, or to leave him as much, by his will. This  
Shooter, promise was made before the 24th day of June 1677. Shooter died in the September following, without having paid the money, or made provision by his will for the payment. An action was brought against his executors, and the question made upon a special verdict was, Whether this promise, it not being in writing, was within the 29 Car. 2. c. 3. whereby it is enacted, "That from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand six hundred and seventy-seven, no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed." Judgment was for the plaintiff: and by the court—It cannot be presumed, that the statute was to have a retrospect, so as to take away a right of action which the plaintiff was entitled to before the time of its commencement.

But a statute may have a retrospect to a time antecedent to that of its commencement.

If a parson hold a farm upon condition not to alienate, and afterwards a statute be made which inflicts a punishment upon a parson who alienates a farm holden by him, the condition remains good.

2 Brownl.  
142.  
Portington  
v. Rogers.

It is said that if *A.* covenant not to do an act which is lawful, and a statute be made afterwards which compels him to do the act, the statute repeals the covenant: or, that if *A.* covenant to do an act which is lawful, and by a statute made afterwards he be forbidden to do the act, the statute repeals the covenant.

Salk. 198.  
Brewster v.  
Kitchell,  
Hil. 9 W. 3.

But it has in a later case been holden, that in construing a statute made after the entering into a contract, the sense of the words ought not to be strained so as to avoid the contract, to the benefit whereof some person was entitled at the time the statute was made.

Ld. Raym.  
1352.  
Wilkinson  
v. Meyer,  
East.  
10 G. 1.

### (D) How long a Statute continues in Force.

SOME statutes are temporary, others are perpetual.

A temporary statute continues in force, unless it be sooner repealed, until the time for which it is made expires; a perpetual one until it is repealed.

[A temporary statute is sometimes made to continue in force after it has ceased to operate substantially, for the purpose of supporting prosecutions against those who have violated it during the term assigned for its continuance.]

29 G. 3.  
c. 64.  
33 G. 3.  
c. 66.  
34 G. 3.  
c. 80. &c. &c.

Every statute for the continuance of which no time is limited is perpetual, although it be not expressly declared so.

It is laid down, that if a statute, which was to have continuance only for seven years, have been after the expiration of that term made perpetual by another statute, only the latter statute is to be considered as in force.

Lit. Rep.  
213. The  
case of the  
College of  
Physicians.

This case does not seem to be law. The statute against perjury, made in the fifth year of the reign of Queen *Elizabeth*, was only to have continuance till the end of the next parliament. Another parliament commenced in the thirteenth year of her reign, another in the twenty-seventh, and another in the twenty-eighth: but this statute was not made perpetual till the twenty-ninth year of her reign. The first state has however been always holden to be in force, and the offence of perjury is constantly charged in an indictment to have been committed against the form of that statute.

Owen, 135.  
West's case.  
Cro. Eliz.  
750.  
Lutw. 221.  
[In a late  
case, the  
court of  
King's  
Bench held  
with great  
clearness,  
that if a sta-  
tute expire,

and afterwards be revived by another statute, the law derives its force from the first statute; and that therefore the statute of 21 Jac. 1. c. 4. extends to statutes made since, which revive statutes made before it. *Shipman v. Henbest*, 4 Term Rep. 109.]

In an indictment for perjury in an affidavit for holding to bail, the affidavit was alleged to have been taken by virtue of the 12 G. 1. c. 29. a statute made for five years, but which was afterwards continued with some alterations by the 5 G. 2. c. 27. It was objected for the defendant, that it ought to have been alleged

Str. 1066.  
Rex v.  
Morgan.

that the affidavit was taken by virtue of the latter act, and especially as this is not a mere continuing statute, the former being thereby altered. The objection was over-ruled; and by Lord *Hardwicke*, Ch. J.—When a statute is continued, every person is estopped to say that it is not in force; and as there is no alteration in the latter statute as to the subject-matter of the present indictment, it is no more than a continuance of the former *quo ad hoc*.

Lutw. 221. It is moreover in divers books laid down, that if, before the expiration of a temporary statute, it be made perpetual by another statute, the former statute is as much in force, as if it had been at first made perpetual.

4 Inst. 43. Divers parliaments have attempted to prevent the repeal of their statutes by subsequent parliaments; but this never could be effected; for a subsequent parliament has always power to abrogate, suspend, qualify, or make void, in the whole or in part any statute made by a former parliament, notwithstanding any words of restraint or prohibition contained in such statute.

Jenk. Cent. 2. Some parts of *magna charta*, although it be expressly declared by the 42 E. 3. c. 3. that all statutes contrary thereto shall be void, have been repealed, and other parts have been altered by subsequent statutes; yet such statutes have been constantly holden to be in force.

36 G. 3. c. 20, 21, 22. [But an act cannot be altered or repealed in the same session in which it is passed, unless there be a clause inserted expressly reserving a power to do so.]

2 Inst. 686. If a statute, which has been repealed, be afterwards revived, the repealing statute becomes of no force.

12 Rep. 7. The Bishops' case. 2 Inst. 686. By the repeal of a repealing statute the original statute is revived.

12 Rep. 7. The Bishops' case. If a statute have been repealed by three different statutes, and only two of the repealing statutes are repealed, the third continues in force, and repeals the original statute.

Jenk. 233. pl. 6. If a statute be repealed, all acts done under it whilst it was in force are good; but, if a statute be declared to be null, all acts done under it whilst it was in force are void.

11 Rep. 61. Foster's case. Show. 520. Ld. Raym. Every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto: for *leges posteriores priores abrogant*.

160. 4 Inst. 43. [The statute of 5 G. 1. c. 27. inflicts a fine, not exceeding 100*l.* and three months imprisonment, on such persons as shall be convicted of seducing artificers.—The 23 G. 2. c. 13. inflicts a penalty of 500*l.* and twelve months imprisonment for the same offence. Lord Mansfield held, that the latter statute was in this respect a virtual repeal of the former. *Rex v. Cator*, 4 Burr. 2026. So, *converso*, where a latter statute inflicts a milder punishment than a preceding statute for the same offence. *Rex v. Davis*, Leach's Cases, 228.]

Raym. 397. Anon. If a statute, before perpetual, be continued by an affirmative statute, for a limited time, this does not amount to a repeal thereof at the end of that time.

Cowp. 207. 2 Ark. 675. [But subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and

and methods of proceeding ordained by preceding statutes, without negative words. Nor hath a latter act of parliament ever been construed to repeal a prior act, unless there be a contrariety or repugnancy in them, or at least some notice taken in the former law of the preceding one, so as to indicate an intention in the law-makers to repeal it. Neither is a bare recital in a statute, without a clause of repeal, sufficient to repeal the positive provisions of a former statute.]

If two statutes, repugnant to each other, be made in the same session of parliament, the latter only shall have effect.

St. Clement's v. The Inhabitants of St. Andrew's.

If the latter part of a statute be repugnant to the former part thereof, it shall stand, and, so far as it is repugnant, be a repeal of the former part; because it was last agreed to by the makers of the statute.

The Governor of Chelsea Water Works.

But the law does not favour a repeal by implication, nor is it to be allowed, unless the repugnancy be quite plain: for as such repeal carries with it a reflection upon the wisdom of the former parliament, it has ever been confined to the repealing, as little as possible, of the preceding statute.

Although two acts of parliament are *seemingly* repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction, that the latter may not be a repeal of the former, by implication.

Dore v. Gray, 2 Term Rep. 365.

6 Mod. 287. The Inhabitants of

Fitzgib. 195. The Attorney-General v.

11 Rep. 63. Foster's case. 1 Roll. Rep. 88. 10 Mod. 118.

Dyer, 347. Weston's case. Bro. Parl. pl. 9. 11 Rep. 63. Hard. 344.

## (E) Of the vast Power of a Statute.

**A** Statute can do no wrong; but it may do some things which seem very strange: for it may discharge a person from the allegiance he lives under, and restore him to a state of nature.

12 Mod. 688. The City of London v. Wood.

An estate may be made to cease by a statute in the same manner as if the party possessing had been dead; as is done by the 21 H. 8. c. 13. which declares, that if a person accept a second benefice, the first shall be void, in the same manner as if the incumbent had died.

6 Rep. 40. Mildmay's case.

A man may be enabled by a statute to have, or be an heir, who otherwise could not have, or be an heir.

1 Lev. 75. Wheatley v. Thomas.

An estate-tail may be limited by a statute without a donor; and the validity of such a limitation is not to be measured by the rules of the common law: for a statute can controul the rules of the common law.

Raym. 355. Murrey v. Eyton. 1 Jon. 105.

A man can only forfeit such estate as he has, as if tenant in tail, with remainder over, forfeit, the remainder is saved. But, if the land of tenant in tail be given to the king by a statute, the remainder is not saved.

Godb. 315. Sheffield v. Ratcliffe.

If the king become entitled by a statute to the land of J. S. he takes it discharged of all tenure.

Bro. Parl. pl. 77.

Bro. Parl.  
pl. 28.

If land, subject to a rent-charge, be given to a person by a statute, the rent-charge is thereby discharged.

12 Mod.  
688. The  
City of Lon-  
don v. Wood.

A statute cannot make it lawful for *A.* to commit adultery with the wife of *B.* for the law of God forbids this: but it may dissolve her marriage with *B.* and so enable her to marry *A.*

2 Jon. 12.  
Crow v. Ramsay,

A statute may make a woman a mayor or a justice of the peace. *per Wild, J.*

## (F) Of a publick or private Statute.

8 Rep. 138.  
Barrington's  
case.

A Statute which relates to all the subjects of the realm is a publick statute.

[The distinction between publick and private acts is marked with admirable precision in the following note in the printed report from the committee for the promulgation of the statutes.—PUBLICK AND PRIVATE ACTS.—IN LEGAL LANGUAGE.—1. Acts are deemed to be *publick and general acts*, which the judges will take notice of without pleading, viz. acts concerning the king, the queen, and the prince; those concerning all prelates, nobles, and great officers; those concerning the whole spirituality; and those which concern all officers in general, such as all sheriffs, &c.—Acts concerning trade in general, or any specifick trade; acts concerning all persons generally, though it be a special or particular thing, such as a statute concerning assizes, or woods in forests, chafes, &c. &c. Com. Dig. tit. Parliament (R. 6). 2. *Private acts* are those which concern only a particular species, thing, or person, of which the judges will not take notice without pleading them, viz. acts relating to the bishops only; acts for toleration of dissenters; acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to the colleges only in the universities. Com. Dig. tit. Parliament (R. 7). 3. In a *general act* there may be a *private clause*, *ib. d.*; and a *private act*, if recognized by a *publick act*, must afterwards be noticed by the courts as such. 2 Term Rep. 569.—2. IN PARLIAMENTARY LANGUAGE.—1. The distinction between *publick* and *private* bills stands upon different grounds as to fees.—All bills whatever, from which private persons, corporations, &c. derive benefit, are subject to the payment of fees, and such bills are in this respect denominated *private bills*.—Instances of bills within this description are enumerated in the second volume of Mr. Hatfield's Precedents of Proceedings in the House of Commons, edit. 1796, p. 267. &c.—2. In parliamentary language, another sort of distinction is also used; and some acts are called *publick general acts*; others, *publick local acts*, viz. church acts, canal acts, &c. To this class may also be added some acts which, though publick, are merely personal, viz. acts of attainder, and patent acts, &c. Others are called *private acts*; of which latter class some are local, viz. inclosure acts, &c. and some personal, viz. such as relate to names, estates, divorces, &c.\*

10 Rep. 101.  
Beaufage's  
case.

Although the words of a statute are particular: yet if the intent be general, it is a publick statute.

Plow. 204.  
Stradling v.  
Morgan.

If the intent of a statute be particular, it shall, notwithstanding the words are general, be deemed a private statute.

4 Rep. 77.  
Holland's  
case.

A statute which concerns the king is a publick statute: for every subject has an interest in the king, who is the head of the body politick; and consequently ought to be as sensible of that which affects him, as a member of the natural body is of what the head at any time feels.

Sid. 209.  
Rex v.  
Fawlin.

The preamble of the 13 & 14 Car. 2. c. 12. recites divers mischiefs to the publick which arise for want of proper regulations

\* It must give additional authority to the extracts which have been made from the Reports of the Committees for inquiring into the state of the temporary statutes, and the means of better promulgating the laws, to mention, that they come from the pen of a gentleman universally allowed to have a very exact knowledge of our laws and constitution, I mean, Mr. Abbot, one of the representatives for the borough of Heston in the last and present parliament, and the mover of the resolutions which formed and gave activity to those most useful committees.]

concerning the poor; and by § 4. it is enacted, "That, for the redress of the mischiefs intended to be remedied, a workhouse shall be erected in the county of *Middlesex*." This statute has been holden to be a publick statute; because it concerns the safety of the king's person, and the publick peace, that a stop should be put to such mischiefs. And the clause for erecting a workhouse has been holden to be publick; because as it refers to the mischiefs mentioned in the preamble, a remedy is thereby provided for such mischiefs in the county of *Middlesex*.

A statute which concerns the publick revenue is a publick statute: but some clauses therein may, if they relate to private persons only, be private; for a statute may be publick in one part and private in another.

12 Mod. 249. Anon. 12. 12 Mod. 613. 10 Rep. 57. Plow. 65. Hob. 227. Sid. 24.

Although a statute be of a private nature, as if it concern a particular trade, yet if a forfeiture be thereby given to the king, it is a publick statute.

Skin. 429. Rex v. Baggs.

In an action of debt upon a bond the defendant pleaded a certain statute for the discharge of poor prisoners, but did not set it out. Exception was taken, that the statute should have been pleaded at large, because it is a private statute; inasmuch as it does not extend to all poor prisoners, but to such only as were in prison at a time therein mentioned: but by the court -- This shall be construed to be a publick statute. 1. Because all the people of *England* may be interested as creditors of the prisoners. 2. It is a charitable act and therefore ought to have a more favourable construction. 3. As it is a long act and difficult to be pleaded, poor prisoners could never bear the expence of pleading it specially.

Ld. Raym. 120. Jones v. Axen.

But the 8 & 9 W. 3. c. 18. for the relief of creditors by making composition with their debtors, in case two thirds in number and value agree thereto, was holden to be a private statute.

Ld. Raym. 390. Pitt v. Pole-hampton. 12 Mod. 249.

The judges are not obliged to take notice of a statute of general pardon, unless they are by such statute directed so to do: for as a statute of general pardon only relates to offenders, it is not a publick statute; and it is by no means a consequence, that because a man is enabled to give such statute in evidence upon the general issue, the judges must take notice of it as to any other purpose.

Ld. Raym. 709. Ingram v. Foot. 12 Mod. 613.

A statute which concerns trade in general is a publick statute; the genus trade being composed of all kinds of trade.

4 Rep. 76. Holland's case.

But a statute, which relates only to a particular trade, or to a particular person of that trade, is a private statute; because the particular trade is a species of the genus trade, and the particular person is an individual of that species.

4 Rep. 76. Holland's case.

The statute against non-residence and that against pluralities are publick statutes; because they extend to every species of the spirituality.

4 Rep. 120. Dumpsor's case. 2 Roll. Abr. 465. 4 Rep. 76.

4 Rep. 76. But a statute which concerns only a certain species of the spirituality, as the bishops; or an individual of a certain species, as Holland's case. a particular bishop; is a private statute.  
Roll. Abr. 466. Cro. Jac. 112. 2 Mod. 57.

4 Rep. 76. The statute of first *Westminster*, which says, *that no sheriff or other minister of the king shall take any reward to do his office, but be satisfied with what he receives from the king*, is a publick statute; because it extends to all officers.  
Holland's case.

2 Saund. 154. The 23 *H. 6. c. 10.* which is confined to sheriffs, has in divers Benfon v. cases been holden to be a private statute.  
Welby, Trin. 22 Car. 2. Plow. 65. Sid. 24. 439.

2 Lev. 103. But the contrary has been laid down in other cases; and in Okey v. Sell. one subsequent to the case in *Saunders, Holt Ch. J.* was of opinion, Pasch. that this is a publick statute; [and that opinion has been since 26 Car. 2. confirmed by the court of King's Bench.]  
1 Lev. 83. Sid. 23.  
[Samuel v. Evans, 2 Term Rep. 569.]

Plow. 65. The statute made in the time of *Henry the Sixth*, by which all Dyer v. corporations and licences granted by that prince are declared to be void, Manning- was holden to be a private statute; because, as it does not extend ham. Bro. to all corporations, it is not general, but particular in a general- 4 Rep. 76. ralty, or to speak with more propriety, general in a particularity.  
Dyer, 119.

[Note, the distinction between private acts, and publick, was first made in the reign of Richard III. who applied this new invention to the purpose of destroying his enemies by parliamentary attainders. Reeves's Hist. Engl. Law, vol. 3. 379. vol. 4. 129, 130.]

## (G) Of an affirmative or negative Statute.

SOME statutes are from their being in affirmative terms called affirmative statutes; others obtain the name of negative statutes; because they are penned in negative terms.

2 Inst. 200. It is a maxim of law, that an affirmative statute does not take 1 Inst. 111. away the common law.  
115. Show. Parl. Ca. 64.

Bro. Parl. By the 43 *E. 3. c. 11.* it is enacted, "That the pannel of affize pl. 70. "shall be arrayed four days before the day of affize;" yet, if this be done two days before the day of affize, it is good; for two days were sufficient at the common law, and where a statute is affirmative it does not take away the common law.

Bro. Parl. The statute of *Marlbridge, c. 21.* and the statute of 2 *Westm. pl. 108. c. 39.* are, "That after complaint made to the sheriff he may "take the *posse comitatus*, and make replevin." Notwithstanding this statute the sheriff may take the *posse comitatus* to serve any process with, as he could before at the common law; for an affirmative statute does not take away the common law.

Although



Although an affirmative statute do not take away the common law, it is nevertheless binding; and a party may make his election to proceed upon the statute, or at the common law.

2 Inst. 200.  
Bro. Parl.  
pl. 70.  
1 Rep. 64.  
Cro. Eliz. 104.

It is in the general true, that if an affirmative statute, which is introductive of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner.

Plow. 206.  
Stradling v.  
Morgan.  
Hob. 298.  
Sid. 56.

But, where the question was, Whether an appointment of overseers, made after the expiration of the time limited by a statute for such appointment, was valid? It was holden to be so; and by the court—The 43 *Eliz. c. 2.* ought to have a liberal construction; because it is a statute under which provision is to be made for the poor. As it was not in the power of the parish to compel the justices to make an appointment within the time, the appointment ought *ex necessitate* to be holden good. Although that statute be introductive of a new law, no negative ought to be implied against the meaning and justice thereof.

Strat. 1125.  
Rex v.  
Sparrow.  
[Rex v.  
Stubbs,  
2 Term Rep.  
395. S. P.]

If a new power be given by an affirmative statute to a certain person, or to certain persons, by the designation of that one person, although it be an affirmative statute, all other persons are in the general excluded from the exercise of the power; it being a maxim, that *inclusio unius est exclusio alterius*.

11 Rep. 64.  
Foster's case.

If an action founded upon a statute be directed to be brought before the justice of *Glamorgan* in his sessions, it cannot be brought before any other person, or in any other place.

Plow. 206.  
Stradling  
v. Morgan.

It being by the 31 *E. 3. c. 12.* provided, "That error in the "Exchequer-chamber shall be amended before the chancellor "and treasurer," such error cannot be amended before any other person or persons.

11 Rep. 59.  
Foster's case.

By the 26 *G. 2. c. 22.* for establishing the *British Museum*, some acts are directed to be done by the majority of the trustees. It was so clear, that these acts could not be done by the majority of the trustees present at a meeting, unless that majority were likewise a majority of the whole trustees, that the 27 *G. 2. c. 16.* was made for enabling the majority of those trustees who shall be present, provided that seven are present, at any meeting to do these acts.

But the designation of a certain person, to whom a new power is given by an affirmative statute, does not exclude another person, who was, by a precedent statute, authorized to do it, from doing the same thing.

11 Rep. 64.  
Foster's case.

By the 8 *H. 6. c. 16.* it is provided, *That after office found he who finds himself aggrieved may within a month offer his traverse, and to take the premises to farm; and that the chancellor, treasurer, or other officer shall demise them to him to farm.* By the 1 *H. 8. c. 16.* liberty is given to the person aggrieved, *to do this at any time within the space of three months.* Afterwards the 32 *H. 8. c. 40.* authorizes the master of the wards, *to grant a lease of the lands of a ward or an idiot while they remain in the hands of the crown.* This last statute,

Stamf. Prer.  
69.  
11 Rep. 64.

not-

notwithstanding the designation of a new person, shall not take away the power given by the former: for if, before any lease is granted by the master of the wards, the chancellor, or treasurer, grant a lease of the premises, the master of the wards cannot afterwards demise them.

1 Rep. 64.  
Foster's case.

An affirmative statute, even if there are negative words in it, does not, in many cases, exclude the jurisdiction of the court of King's Bench; because the pleas there are before the king himself.

Bro. Parl.  
pl. 72.

A negative statute so binds the common law, that a man cannot afterwards make use thereof.

2 Inst. 105.  
Bro. Parl.  
pl. 72.

At the common law, if a lord distrained for customs, services, or other duties, when none were behind, an action of trespass lay: but since the statute of *Marlbridge*, the words of which are, *Si quis major vel minor districtiones faciat super tenementum suum, pro servitijs vel consuetudinibus que sibi deberi dicat, vel pro re altera, unde ad dominum feodi pertineat districtiones facere, et postea convincatur quod tenens ea sibi non debet, non ideo puniatur dominus per redemptionem*, it has been holden that in such case no action lies at the common law.

2 Inst. 68.  
Bro. Parl.  
pl. 72.

A woman, as well as a man, might at the common law have had an appeal of the death of one of her ancestors: but a woman can now only have an appeal in the case of her husband's death; it being by *Magna Charta*, c. 34. declared, *quod nullus capiatur aut imprisonetur propter appellum femine de morte alterius quam viri sui*.

1 Inst. 111.  
115.

An affirmative statute does not take away a custom.

[In another place Lord Coke lays down the like rule as to an affirmative statute not taking away the common law, but with more particularity. For his words are, that a statute made in the affirmative without any negative expressed or implied, does not take away the common law. 2 Inst. 200. This seems to be the justest way of stating the rule both as to common law and customs. Hargr. & Butl. Co. Litt. 115. a. note.]

1 Inst. 115.

It is laid down that a custom is good against a negative statute, unless a new law be thereby introduced: for that if the statute be only declaratory of the common law, as a man might have alleged a custom against the common law, so he may against such statute.

1 Jon. 271.  
Ld. Love-  
lace's case.

But it has been since holden, that no prescription or custom is good against a negative statute, whether it be declaratory of the common law, or introductory of a new law.

2 Bulstr. 36.  
Show. 420.  
2 Hawk. P. C. c. 10. § 8.]

Show. Parl. Ca. 175. [See *vide* Hargr. & Butl. Co. Litt. 115. a. note (9). *Vide etiam*

## (H) Whose Province it is to construe a Statute.

Hob. 146.  
Sheffield v.  
Ratcliffe.  
Flow. 109.  
3 Rep. 7.

THE power of construing a statute is in the judges; who have authority over all laws, and more especially over statutes, to mould them according to reason and convenience to the best and truest use.

Mar. 90.  
pl. 148.  
2 Inst. 611.

But only the judges of the temporal courts have the power of construing a statute.

[If the misinterpretation of an act of parliament directed to an inferior court, in a proceeding confessedly within their jurisdiction, be the subject of *appeal*, and not of *prohibition*, as seems to be pretty generally admitted, the position in the text is stated too broadly. 2 H. Bl. 536. 4 Term Rep. 398.]

An ordinary cannot impose a new condition in a bond of administration, but must take such bond in the words of 21 H. 8. c. 5. and when an action is brought upon it, the meaning of that statute, and of the condition, must both be ascertained by a court of common law.

A question arising, whether a person were a bankrupt? it was objected, that as the jury had only found the evidence, and had not drawn the conclusion, the court cannot do this. The objection was not allowed; and by the court—The court may conclude from the evidence, whether the person were a bankrupt within the meaning of any statute.

In an action brought for the penalty given by the 5 Ann. c. 14. it was found by a special verdict, that the defendant carried on the trade of a poulterer; that for the carrying on of this trade he kept an open shop, wherein he bought and sold geese, chickens, and other poultry; that he had a hare in his custody, and did sell the hare to J. S. for four shillings; and that at the time of having the hare in his custody, and of selling it, he was seized in fee of an estate of one hundred pounds a year. The question being, whether the plaintiff were a chapman within the meaning of the 5 Ann. c. 14.? it was holden that he was not. In arguing this question it was said, that as the jurors have only found facts, and have not expressly found that the defendant was a chapman within the meaning of that statute, the plaintiff ought not to have judgment, although the court should be of opinion, that the defendant was a chapman within the meaning of that statute. The opinion of the court upon this point was, that as the question, whether the defendant were a bankrupt within the meaning of that statute? does in a great measure depend upon the construction of that statute, it is a proper question for the determination of the court; and that the facts found are sufficient to enable the court to determine it. In this case the authority of *Dodsworth v. Anderson*, 2 Jon. 142. was recognized.

## (I) Rules to be observed in the Construction of a Statute.

- I. Words and Phrases, the Meaning of which in a Statute has been ascertained, are, when used in a subsequent Statute, to be understood in the same Sense.

**EXCEPTION** was taken to an indictment upon the 14 Car. 2. c. 12. against churchwardens and overseers, for not having made a rate to reimburse a constable, that the statute only puts it in their power by the word *may* to make such rate, but does not require the doing it as a duty, for the omission of which they are punishable: the exception was not allowed: and by the court—Where a statute directs the doing of a thing for the sake of justice or the publick good, the word *may* means the same as the word *shall*. The 23 H. 6. says the sheriff *may* take bail; but the construction has been that he *shall* do this.

Every

Hob. 83.  
Slawney's  
case.

2 Jon. 142.  
Dodsworth  
v. Anderson.

Sayer, 121.  
Hearle, *qui  
tam*, v.  
Boulter.  
Hil. 28 G. 2.

Salk. 609.  
Rex v. Bar-  
low.  
Vern. 154.

Bro. Coro. Every crime, the perpetrator of which is by any statute ordain-  
204. ed to have judgment of life or member, is a felony; although the  
1 Inst. 391. word *felony* be not contained in the statute.  
2 Inst. 434.  
3 Inst. 91. Hob. 293. 1 Hawk. c. 41. § 2.

1 Inst. 391. But, if an offence be only prohibited by a statute upon pain of  
3 Inst. 145, forfeiting all that the offender has; or of forfeiting his body and  
146. goods; or of being at the king's will for body, land, and goods;  
Hob. 270. it shall amount to no more than a misdemeanor.  
293.

4 Inst. 171. If an act of parliament say, *an offender shall be punished according  
to his demerit*, these words import only, that he shall be punished  
in the ordinary course of justice by indictment.

Salk. 606. When a statute gives a penalty *to be recovered before justices of  
Anon. the peace*, but prescribes no method of recovering it, the proper  
method is by indictment.

MS. Rep. An information, exhibited against the defendant, a sadler, for a  
Rex v. Wil- penalty given by the 1 Jac. 1. c. 22. was quashed; and by Lord  
liams, Trin. Mansfield, Ch. J.—Where a power is given, as is done in the pre-  
30 G. 2. sent case, by a statute, *to inquire, hear, and determine*, it always  
means according to the course of the common law by a jury; and  
the proceeding must, in such case, be by indictment.

## 2. In the Construction of one Part of a Statute every other Part ought to be taken into Consideration.

1 Inst. 381. The most natural and genuine way of construing a statute is to  
construe one part by another part of the same statute: for this  
best expresseth the meaning of the makers; and such construction  
is *ex visceribus actus*.

Plow. 365. If any part of a statute be obscure, it is proper to consider the  
Stowell v. other parts; for the words and meaning of one part of a statute  
Zouch. frequently lead to the sense of another.  
11 Mod. 161.

1 Show. 108. A statute ought, upon the whole, to be so construed, that, if it  
Rex v. Ber- can be prevented, no clause, sentence, or word shall be superfluous,  
chett. void, or insignificant.  
Hard. 344.

Parker, 233. [Where words in a statute are express, plain, and clear, the  
Hob. 93. words ought to be understood according to their genuine and na-  
97. tural signification and import, unless by such exposition a contra-  
diction or inconsistency would arise in the statute, by reason of  
some subsequent clause, from whence it might be inferred that  
the intent of the parliament was otherwise. And this holds with  
respect to penal as well as other acts.]

Hard. 324. The title of a statute is not to be regarded in construing it, be-  
Ld. Raym. cause this is no part of the statute.  
77.

Plow. 369. It is in the general true, that the preamble of a statute is a key  
Howell v. to open the mind of the makers, as to the mischiefs which are in-  
Zouch. tended to be remedied by the statute (*a*).  
1 Inst. 79.

[(a) So, the civilians say, *Cessante legis proemio, cessat et ipsa lex*.—But, if the preamble to a statute be a  
key to its construction, it is to be lamented, that it so rarely states the real occasion of the law, and the  
views

views of the proposer of it. The most common recital for the introduction of any new regulation, is to set forth, *that doubts have arisen at common law*, which frequently never existed; and such preambles have, therefore, much weakened the force of the common law, in several instances. See Mr. Barrington's Observations on the more Ancient Statutes, p. 394. 411. 477. to which add 32 G. 3. c. 60.]

But this rule must not be carried so far as to restrain the general words of an enacting clause by the particular words of the preamble: for there was a time when statutes were made without preambles; and the preamble of a statute, is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute.

It was said by Lord Cowper, that he could by no means adopt the notion, that a preamble shall restrain the operation of an enacting clause; and he added, that if the preamble of the *Coventry* act had only recited the barbarity of flitting *Coventry's* nose, and the enacting clause had been general against the doing of any thing whereby a man is disfigured or defaced, it might, agreeably to that notion, have been said, that cutting off the lip, or putting out an eye, would not have been within the meaning of this statute, because neither of these is mentioned in the preamble (a).

disapproved of by Lord Chief Baron Parker and Lord Hardwicke, in *Ryal v. Rowles*, 1 Atk. 174. 182. and 1 Vez. 365. 371. For though, in many cases, the preamble will not restrain the general purview, as in *Sir W. Jones*, 163. Palm. 485. on the construction of the statute of the 13th Eliz. yet it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain it. So, though the preamble cannot controul the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be referred to, to explain it. 4 Term Rep. 793.—However, where enacting words will take in the mischief intended to be prevented, they shall be extended for that purpose, though the preamble does not warrant it; and innumerable instances of this kind are in the law-books. 3 Atk. 204. Cowp. 543.]

The general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute.

If by a statute lands are *disgavelled to all intents and purposes*, and made *descendible as lands at the common law*, the former general words are so restrained by the particular subsequent words, that, although the partibility of an estate by which many families have been reduced to a low estate be thereby put an end to, the custom to devise is not taken away: for this custom is a privilege at the common law, and no part of the custom of gavelkind.

The general enacting words of a statute are not to be restrained by any words introductory to the enacting words.

If a particular thing be given or limited in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words of the same statute.

A saving in a statute, which is repugnant to the purview of the statute, is void.

The purview of a statute may be qualified or restrained by a saving in the statute: but, if the saving be repugnant to the purview, it is void.

8 Mod. 144.  
Rex v. Althoes.

6 Mod. 62.  
Palm. 486.  
1 Jon. 164.

1 P. Wms.  
320.  
Copeman v. Callant.  
[(a) But this opinion of Lord Cowper with respect to the operation of the preamble, is expressly

disapproved of by Lord Chief Baron Parker and Lord Hardwicke, in *Ryal v. Rowles*, 1 Atk. 174. 182. and 1 Vez. 365. 371. For though, in many cases, the preamble will not restrain the general purview, as in *Sir W. Jones*, 163. Palm. 485. on the construction of the statute of the 13th Eliz. yet it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain it. So, though the preamble cannot controul the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be referred to, to explain it. 4 Term Rep. 793.—However, where enacting words will take in the mischief intended to be prevented, they shall be extended for that purpose, though the preamble does not warrant it; and innumerable instances of this kind are in the law-books. 3 Atk. 204. Cowp. 543.]

8 Mod. 8.  
Rex v. The Archbishop of Armagh.

1 Lev. 80.  
Wifeman v. Cotton.

8 Mod. 144.  
Rex v. Althoes.  
Palm. 486. 1 Jon. 164.

1 Jon. 26.  
Standon v. The University of Oxford.

1 Rep. 47.  
Alton  
Wood's case. 564.

1 Jon. 339.  
Rex v. Priest.  
10 Mod. 119.

Fitzg. 195.  
The Attorney-General  
v. the Governors of Chelsea waterworks.

If a proviso in a statute be directly contrary to the purview of the statute, the proviso is good, and not the purview: because it speaks the later intention of the legislators.

Hob. 226.  
Parker, 13,  
14.

[As one chapter in a statute may be both general and particular, because one chapter may contain divers acts and laws, which may be as several in their natures as if they were in several chapters; so, by parity of reason, where there are different provisions for different purposes, and penned in different words in the same chapter, they ought to be so construed, to avoid inconsistency, as if they had been in different chapters.]

3. If divers Statutes relate to the same Thing, they ought to be all taken into Consideration in construing any one of them.

Dougl. 30.

[It is an established rule of law, that all acts in *pari materia*, are to be taken together, as if they were one law.]

Plow. 206.  
Stradling v.  
Morgan.

If one statute prohibit the doing of a thing, and another statute be afterwards made, whereby a forfeiture is inflicted upon the person doing that thing, both are to be considered as one statute.

Bro. Wasse,  
pl. 68.

When an action founded upon one statute is given by a subsequent statute in a new case, every thing annexed to the action by the first statute is likewise given.

4 Rep. 4.  
Vernon's case.

A statute lately made may be holden to be within the equity of a statute made long since; and there are in our books frequent instances of its having been so holden.

Ld. Raym.  
1028.  
Sir William  
Moore's case.  
2 Jon. 63.

If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.

1 Vent. 246.  
Bayley v.  
Murin.

The 13 *Eliz. c. 10. concerning leases made by spiritual persons*, being enlarged by the 14 *Eliz. c. 11.* although only the former of these statutes be recited in the 18 *Eliz. c. 11.* it has been holden, that the latter is virtually recited therein.

In the same case it is laid down, that there is such a connection betwixt all the statutes concerning leases made by ecclesiastical persons, that they are all to be taken into consideration in the construction of any one of them. The 32 *H. 8. c. 28.* is not recited in the 1 *Eliz. c. 19.* nor in the 13 *Eliz. c. 10.* yet a lease is not warranted by either of these statutes, unless it have the qualifications required by the 32 *H. 8. c. 28.*

Earn. Chan.  
Rep. 276.  
Wallis v.  
Hodson.

The 22 & 23 *Car. 2. c. 10. for the better settling of intestates' estates*, is continued with some additional clauses by the 1 *Jac. 2. c. 17.* It was holden by Lord *Hardwicke* chancellor, that for this reason the latter statute must be construed as if the former had been therein recited.

MS. Rep.  
Rex v.  
Loxdale and  
others.  
Hil. 30 G. 2.

A question arising, whether justices of the peace had a power to appoint five overseers for the parish of *St. Chads* in *Shrewsbury*? it was holden, that they had not: And by Lord *Mansfield* Ch. J. the number of overseers was by the 39 *Eliz. c. 3.* to be precisely four.

As this number might in some places have been found too large, power is given by the 43 *Eliz. c. 2.* of appointing four, three, or two, respect being had to the greatness of the parish; but no power is given to exceed, in any place, the number of four. The rule of law as to a special authority is, that every thing done under the colour thereof which is not within it is void. There was no need to insert negative words in either of the statutes: nay, since no power had been ever given to appoint five overseers, it would have been quite nugatory to have said that five shall not be appointed. As the 39 *Eliz.* was undoubtedly under the consideration of the legislature when the 43 *Eliz.* was made, it ought, although long since expired, to be taken into consideration in construing the latter statute: for it is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken to be one system and construed consistently; and the practice has been so to do in cases of bankruptcy, church leases, and in other cases.

#### 4. The common Law ought to be regarded in the Construction of a Statute.

If a statute make use of a word the meaning of which is well known at the common law, the word shall be understood in the same sense it was understood at the common law.

To know what the common law was before the making of a statute, whereby it may be known, whether the statute be introductory of a new law or only affirmatory of the common law, is the very lock and key to set open the windows of a statute.

6 Mod. 143.  
Smith v.  
Harman.

Plow. 365.  
Zouch v.  
Stowell.  
2 Inst. 301.  
308.  
3 Rep. 13. Hob. 83. 97.

In order to construe a statute truly, four things are necessary to be understood and considered. 1. What the common law was before. 2. What the mischief was for which the common law had not provided. 3. The remedy that is by the statute provided for the mischief. 4. The true reason of the remedy.

The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases.

2 Inst. 148. 301. 1 Saund. 240. 10 Mod. 245.

By the statute *de donis* it is enacted, that a fine levied of entailed lands *ipso jure sit nullus*: yet the construction has been, that such fine shall not be a nullity, and only a discontinuance; because at the common law, if a bishop seised in the right of his church, or a husband in the right of his wife, had aliened by a fine, it was but a discontinuance.

When the provision of a statute is general, it is subject to the controul and order of the common law.

3 Rep. 83.  
The Case of  
Fines.  
Hob. 97.

1 Show. 455.  
Rex v. The  
Bishop of

London, Sav. 39. Hard. 62.

11 Mod.  
150.

[In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction, as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares; therefore, in all general matters the law presumes the act did not intend to make any alteration; for if the parliament had had that design, they would have expressed it in the act.]

11 Rep. 59.  
Forster's  
case.  
Hob. 298.  
Cart. 36.  
Vaugh. 179.

If a new remedy be given by a statute in a particular case, this shall not be extended to alter the common law in any other than that case. [Or, as it seems better expressed by my Lord *Vaughan*, When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of publick utility, when the end of the act appears to be larger than the enacting words.]

Bro. Parl.  
pl. 72.  
2 Inst. 455.  
Vaugh. 179.

The statute of 1 *Westm. c. 20. de malefactoribus in parcis et vivariis* shall not extend to *forests*: because it is in restraint of the common law, and such statute is to be construed strictly.

Win. 86.  
Hickford v.  
Machin.

An obscure statute ought to be construed according to the rules of the common law.

#### 5. The Intention of the Makers of a Statute ought to be regarded in the Construction of the Statute.

Plow. 232.  
William v.  
Barkley.  
11 Rep. 73.

Such construction ought to be put upon a statute, as may best answer the intention which the makers had in view; for, *qui hæret in litera, hæret in cortice*.

Plow. 205.  
Stradling v.  
Morgan.  
Lit. Rep.  
212.  
11 Mod. 161.  
1 Show. 491.  
1 Jon. 105.

The intention of the makers of a statute is at sometimes to be collected from the cause or necessity of making a statute; at other times from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute.

2 Inst. 11.  
136. 181.

Great regard ought in construing a statute to be paid to the construction, which the sages of law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers. It is moreover a maxim, that *contemporanea expositio est fortissima in lege*.

Plow. 57.  
Wimbish v.  
Tailboys.

Wherever any words of a statute are obscure or doubtful, the intention of the legislators is to be resorted to, in order to find the meaning of the words.

Plow. 366.  
Zouch v.  
Stowell.  
10 Rep. 101.

A thing, which is within the intention of the makers of a statute, is as much within the statute, as if it were within the letter.

Plow. 366.  
Zouch v.  
Stowell.

By the 4 *H. 7. c. 24.* it is provided, that the right of a person, who was within the age of twenty-one years at the time of levying a fine, shall not be thereby bound: yet, if the disseisee die leaving a wife with child, and the disseisor levy a fine, and afterwards  
the



the child be born, the child, although not within the letter of the statute, (because, as the age of a child begins only from its birth, it cannot be said to have been at the time the fine was levied within the age of twenty-one years,) is within the meaning; and his right shall be saved.

The words of 2 *Westm. 2. c. 23.* are, *in casu quando vir amisit per defaultam tenementum quod fuit jus uxoris suæ, durum fuit quod uxor post mortem viri sui non habuit aliud recuperare quam per breve de recto, propter quod dominus rex statuit, quod mulier post mortem viri sui habeat recuperare per breve de ingressu, cui ipsa in vita sua contradicere non potest.* Only a loss by default of the husband is within the letter of the statute; but the construction has been, that a woman shall have a writ of *cui in vita*, although the loss was by default of both herself and husband; because, as she is presumed to have acted under the coercion of her husband, this case is within the intention of the makers of the statute.

Plow. 57.  
Wimbish v.  
Tailboys.

A thing which is within the letter of a statute, is not within the statute, unless it be within the intention of the makers.

The statute of *Marlebridge, c. 4.* prohibits generally *the driving of a distress taken in one county into another.* It has however been adjudged, that if land holden of a manor in one county lie in another county, the lord may distrain upon the land, and drive the distress into the county where the manor lies; for as it would be inconvenient and a great loss to the lord, if he could not drive the distress to his manor, this case, although within the letter, is not within the meaning of the statute.

Plow. 18.  
Reniger v.  
Fogatia.

By the statute of *Gloucester, c. 1.* it is provided, "That the disseisor shall recover damages, in a writ of entry founded upon a disseisin, against him who becomes tenant after the disseisor." Yet, if the disseisor make a feoffment by deed to three persons, and make livery of seisin to two of them, but the third was not present at the livery, nor ever agreed to the feoffment, nor received any of the profits, he shall not, although he become, by the death of the other two, tenant after the disseisor, be liable to answer in damages to the disseisor: for the legislators could not intend to make him, who never assented to the wrong done to the disseisor, answerable for it.

Plow. 205.  
Stradling v.  
Morgan.

[Where it is manifestly the intention of the legislature, that a subsequent act of parliament shall not controul the provisions of a former act, the subsequent act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former act.

Thus, in *Bro. tit. Parliament, 52.* "Where a statute is, that the merchant shall import bullion of two marks for every sack of wool exported, and then another statute was made, that the merchant should not be charged except for the ancient custom, this does not repeal the first statute." *Vide causam, 4 E. 4. 12.* And the reason is, that it clearly was not the intent of the legislature that it should have that effect.

Again, houses built on lands embanked from the *Thames*, in pursuance of 7 G. 3. c. 37. which vests those lands in the owners

Williams v.  
Pritchard,  
4 Term  
Rep. 2.

free from taxes, were holden not to be liable to be assessed to the general land-tax imposed by 27 G. 3. For though (strictly speaking) the land-tax is an annual statute, and the words of the land-tax act, which was passed in the 27th year of G. 3. are general and sufficiently large to subject these lands to the payment of the tax in question, yet, as the land-tax is one of the ways and means for raising the supplies every year, and is now become part of the constant resources of the country, the legislature in passing the 27 G. 3. could not intend to repeal the provisions of 7 G. 3. which exempted these lands from the land-tax.]

## 6. In what Cases, a Statute ought to have an equitable Construction.

1 Inst. 24.

By an equitable construction, a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is, that the law-maker could not set down every case in express terms.

Plow. 467.

Eyfton v.

Studd.

[So the great

master of

Ethicks—

ὁταν εν λεγει

μεν ο νομος

καθολικη,

συμφο

δ' επι τοιο

παρα το κα-

θολικη, τδι ορθος

ο νομοθετης

εως αν ειποι,

εχει παρρη,

και ει ηδει,

νομοθετησεν αν.

Arist. Ethic. ad Nicom. lib. 5.

c. 10.]

In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the law-maker present; and that you have asked him this question, Did you intend to comprehend this case? Then you must give yourself such answer, as you imagine he, being an upright and reasonable man, would have given. If this be, that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute: for while you do no more than he would have done, you do not act contrary to the statute but in conformity thereto.

ο νομοθετης, ο κανονισθησεν αν. Arist. Ethic. ad Nicom. lib. 5.

In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter.

Plow. 465.

Eyfton v.

Studd.

[(a) If the

original had

been cor-

rectly stated,

the introduction

of the gloss

would not

have been necessary.

We transcribe the

passage:—Και επι

ουδεν η φουσις

του επιεικους,

επαρμενεια

του νομου,

η ελπειται

δια το καθολικου.

Arist. Ethic. ad Nicom.

lib. 5. c. 10.]

That equitable construction, which restrains the letter of a statute, is defined by Aristotle in this manner. *Æquitas est correctio legis generatim late qua parte defecit*; or, as the passage is explained by Peronius, *Æquitas est correctio quædam legi adhibita, quia ab ea abest aliquid præter generalem sine exceptione comprehensionem* (a).

ο νομοθετης, ο κανονισθησεν αν. Arist. Ethic. ad Nicom. lib. 5. c. 10.]

Plow. 355.

Zouch v.

Stowell.

The words of 2 W<sup>estm.</sup> c. 11. are general, that all bailiffs and receivers, who in passing their accounts before auditors assigned shall be found in arrear, may be committed to the next gaol: yet, if an infant bailiff or receiver be found in arrear, he shall not be committed; for he is not by reason of his want of discretion within the equity of the statute.

Plow. 465.

Eyfton v.

Studd.

If a law be made, that whoever does a certain act shall be adjudged a felon and suffer death, yet, if a madman do this, he shall be excused: for, as the action is not to be imputed to him, but to

an involuntary ignorance brought upon him by the hand of God; he is not within the reason of the law.

But, if a felonious act be done by a drunken person, it is felony; and, although he did not, when drunk, know what he did, he shall, because he brought the ignorance upon himself, suffer death. He does indeed deserve to be doubly punished; for he has been guilty of two offences, the setting of an ill example to others in being drunk, and the doing of a thing which the law prohibited.

Actions, which proceed from involuntary ignorance, are in legal phrase said to have been done *ex ignorantia*; actions which proceed from ignorance that might have been avoided, are said to have been done *ignorantèr*.

Plow. 19.  
Reniger v.  
Fogassa.

*Ibid.*  
[ἐκ τῆς ἀγνοίας  
ἐστὶν καὶ τὸ  
ὁ ἀγνοῶν  
lib. 3. c. 1.]

περὶ αὐτῆς, τὸ ἀγνοῦν τὴν ποινὴν. Arist. Ethic. ad Nicom.

That equitable construction, which enlarges the letter of a statute, is thus defined: *Æquitas est verborum legis directio efficiens, cum una res solummodo legis cavetur verbis, ut omnis alia in equali genere eisdem caveatur verbis*.

Plow. 467.  
Eyston v.  
Studd.

The words of the 13 E. 1. are, *Circumspecte agatis de negotiis tangentibus episcopum Norwicensem*; yet this statute, although only the Bishop of *Norwich* be named, has been always extended by an equitable construction to other bishops.

Plow. 36:  
Platt v. The  
Sheriff of  
London.

The remedy given by the 9 E. 3. c. 3. against executors has been always extended by an equitable construction to administrators; because these are within the equity of the statute.

Plow. 467.  
Eyston v.  
Studd.

A statute ought sometimes to have such equitable construction as is contrary to the letter.

Plow. 109.  
Fulmerston  
v. Steward, 3 Rep. 7.  
Hob. 346.

By the 1 E. 2. §. 2. the breaking of a prison by a prisoner confined for felony is made felony: yet, if a prison be on fire, and a prisoner break it in order to save his life, he shall be excused, notwithstanding the excusing of him be directly contrary to the letter of the statute.

Plow. 13.  
Reniger v.  
Fogassa.

By 2 Westm. c. 12. the party acquitted upon an appeal may recover damages against all who have been abettors of the appeal: yet if a son abet his mother in bringing an appeal, he shall not, although he act contrary to the letter of the statute, be liable to damages; for the common law and reason both say, that it is the duty of a son to aid and abet his mother.

Plow. 88.  
Straunge  
v. Croker.  
2 Inst. 84.

[If a deed respecting lands situate in any of those counties where the legislature have required registration, is not registered, and afterwards the same lands are sold or mortgaged by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, though it is not registered, shall be preferred to him; for though the register act vests the legal estate according to the prior registry, yet it is left open to all equity; and there is no danger to the subsequent purchaser, who might refuse, if he had notice of the prior conveyance. And a similar construction has prevailed upon the statute of enrolments 27 H. 8. c. 16. And so on the statute of frauds, 29 Car. 2. c. 3. the courts have decided, that as

Le Neve v.  
Le Neve.  
1 Vez. 64.

1 Eq. Ca.  
Abr. 19.

it was made with a design to prevent, either in marriage or any other treaties, uncertainty, perjury, and contrariety of evidence, the cases not liable to these inconveniencies are not within it.]

10 Mod.

282.

Hammond v. Webb.

Vaugh. 373.

Bole v.

Horton.

If the words of a statute do not extend to a mischief which rarely happens, they shall not be extended by an equitable construction to that mischief: but the case is to be considered as a *casus omisus*; for the objects of statutes are mischiefs *que frequentius accidunt*. [But it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom.]

3 Leon. 133.

Wroth v.

The Countess of Suffolk.

A statute shall never have an equitable construction, in order to overthrow an estate.

Carth. 396.

Inhabitants

of Dalbury

v. Foster.

Salk. 524.

[But this

rule, that statutes of explanation shall always be taken literally, is denied by Lord Hobart, in 2 Roll. Rep. 500, 501. Winch, 123. Sir Wm. Jon. 39; for no statute-law, he says, should exclude all equity. And in 3 Co. 75. a. it is said in argument, and seems admitted by the court, that statutes of explanation are always interpreted beneficially.]

#### 7. A Statute which concerns the publick Good ought to be construed liberally.

11 Rep. 71.

Magdalen

College's

case.

Sira. 517.

518, 519.

[Parker, 4.

The general rule is, that the king's rights shall not be barred or restrained, unless he be specially named. The instances mentioned in the text, which are adduced as exceptions to it, open a very uncertain latitude. "In such cases," saith a very sensible writer, "I presume, he may be precluded of such inferior claims as might belong indifferently to the king or to a subject, as the title to an advowson or a landed estate, but not stripped of any part of his ancient prerogative, nor of those rights which are incommunicable, and are appropriated to him as essential to his regal capacity." 1 Wooddes. 31, 2. Parker, 180.]

Keilw. 198.

pl. 1.

Every word in an act of general pardon shall be taken most strongly against the king.

Str. 253.

258. Pierce

v. Hopper.

A statute made *pro bono publico* shall be construed in such manner, that it may as far as possible attain the end proposed.

2 Vern. 431.

New River

Company v.

Graves.

The New River water act was holden, although only the city of London be therein mentioned, to extend to places adjacent; because all statutes made for the conveniency of the publick ought to have a liberal construction.

It has been holden, that a statute discharging insolvent debtors ought to be construed strictly, because it gives away the property of some subject; and by *Holt*, Ch. J.—Let a statute be ever so charitable, if it give away the property of a subject, it ought to be construed strictly.

1: Mod.  
513.  
Callady v.  
Pilkington.

8. A remedial Statute ought to be construed liberally.

Such construction ought to be put upon a remedial statute as will tend to suppress the mischief intended to be remedied.

A statute made for the suppression of a fraud, or to give a more speedy remedy for a right, ought to be construed liberally; because such construction is for the furtherance of justice.

3 Inst. 381.  
b.  
Flow. 57.  
Wimbith v.  
Tailboys.

It is the duty of judges to put such construction upon a statute as may redress the mischief; guard against all subtle inventions and evasions for the continuance of the mischief *pro privato commodo*; and give life and strength to the remedy *pro bono publico*, according to the true intent of the makers of the law.

3 Rep. 7.  
Heydon's  
case.  
1 Rep. 123.  
21 Rep. 71.  
Cro. Car.  
533.

A fine levied by a husband seized in the right of his wife is within the letter of the statute of *Gloucester*; but as the heir would be thereby barred of the inheritance of his mother by the warranty of his father, although no assents did descend upon him, the construction, in order to prevent this mischief, has been, that such fine does not bind the heir, unless assents did descend upon him.

1 Inst. 381.

By the 13 *Eliz. c. 10.* it is enacted, "That from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of a college, to any person or persons, bodies politick or corporate, other than for the term of twenty-one years or three lives, shall be utterly void and of none effect, to all intents, constructions, and purposes." After the making of this statute, the master and fellows of *Magdalen College* granted certain premises by indenture to the queen, her heirs and successors for ever, with condition that she should, before a day mentioned in the indenture, convey and assure the same, by letters patent under the great seal, to *Benedict Spinola* a merchant of *Genoa*. The question was, Whether the grant to the queen were good? or, in other words, Whether the queen were bound by the general words of the statute? It was holden, that where the crown has by prerogative any estate, right, title, or interest, this is not barred by the general words of a statute; but that, in this case, as the queen would not be deprived of any estate, right, title, or interest which she had in the premises before the making of the statute, she is bound thereby; and that such construction is necessary, for the preventing of subtle inventions and evasions, by which this act, made for the maintenance of religion and the advancement of arts and sciences, might be eluded.

11 Rep. 74.  
75.  
Magdalen  
College's  
case.

## 9. A penal Statute ought to be construed strictly.

Plow 17. The rules of the common law will not suffer the general words  
 Reniger v. of a statute to be restrained, to the prejudice of a person upon  
 Fogassa. whom a penalty is inflicted: but there are a multitude of cases to  
 Bro. Parl. shew, that the general words of a statute ought to be restrained in  
 pt. 13. favour of such person.

Inst. 468. Wherever a greater punishment is inflicted by a statute for a  
 second offence, an offender is not liable thereto, unless there has  
 been judgment against him for a former offence; for a penal sta-  
 tute ought to be construed strictly, and it does not appear, that he  
 has been guilty of a former offence, unless there has been such  
 judgment.

Bro. Parl. The statute which gives an action of attain in a plea real, being  
 20. a penal statute, has never been extended to a plea personal.

Salk. 205. It was in one case holden, that statutes which give costs are to  
 Cone v. be construed strictly; costs being a kind of penalty.  
 Bowles.

Rep. in time And in another case, wherein the authority of the last-men-  
 of Hard. tioned case was recognized, it was said by Lord *Hardwicke*, Ch. J.,  
 357. Rex to be a settled rule, that statutes which give costs are to be con-  
 v. Inhabit- strued strictly.  
 ants of  
 Glastonry.

3 Rep. 7. However true it may in the general be, that penal laws are to  
 Heydon's be construed strictly, yet, even in the construction of these, the  
 case. intention of the legislators ought to be regarded.  
 S Mod. 65.

Plow. 16. It is declared by the 25 *E.* 3. to be treason for a servant to kill  
 Strange v. his master. A question arising upon this statute, Whether a ser-  
 Croker. vant who had killed his master's wife ought to have judgment to be  
 drawn and hanged, or only to be hanged? it was holden by all the  
 judges, that this is treason, and the judgment was that he should  
 be drawn and hanged: and by *Cooke*, J.—Notwithstanding that a  
 statute, which increases a punishment beyond what it was at the  
 common law, ought not to be extended by an equitable construc-  
 tion, yet the words of such statute ought to be construed according  
 to the true intention of the makers of the statute.

Cro. Car. 71. The 7 *H.* 7. c. 1. and the 3 *H.* 8. c. 1. make the departure of  
 The Sol- a soldier from his captain without licence felony. A question  
 diers' case. arising, Whether the departure of a soldier without licence from his  
 conductor, to whom he was delivered to be brought to the sea-side,  
 was felony? It was resolved by nine judges against three that it  
 was felony; for that a conductor is a captain within the meaning  
 of the statutes, and that a penal statute, when made for the publick  
 service, and good of the king and realm, ought to be construed  
 according to the intention of the makers of the statute.

11 Rep. 34. It was holden, that an offender who had been guilty of arson  
 35. Poul- was not entitled to the benefit of clergy, notwithstanding this was  
 ter's case. not expressly taken from him by any statute; and it is added,  
 that there are many cases in our books where penal statutes have  
 been

been construed by intendment for the suppression of a mischief, the advancement of justice, and the putting of a stop to heinous offences.

A statute which is made for the good of the publick ought, although it be penal, to receive an equitable construction.

2 Brown.  
110, 111.  
110.

A statute, which is penal to some persons, may, provided it be beneficial to all others, have an equitable construction; for every statute is penal to some persons: and if the extending of a penal statute by an equitable construction be more advantageous than prejudicial to the greater part of the people, it may by the rules of law be so extended.

Plow. 36.  
Platt v. The  
Sheriff of  
London.  
Plow. 59.  
10 Mod.  
117.  
2 Brown. 302.

The statute of *Marlebridge, c. 24.* against committing waste is penal; yet it has been construed liberally. The words of this statute are, *firmarii non faciant vastum*: but it has been holden, that the word *firmarii* extends to strangers; it has likewise been holden, that this statute extends to waste *mittendo*, although the word *faciant* in the strict sense of it does only mean active waste.

10 Mod.  
282.  
Hammond  
v. Webb.

It was insisted, that the statute against simony, being a penal law, ought to receive no aid from a court of equity: but by *Wright*, Lord Keeper—This court will aid remedial laws notwithstanding they are penal, not indeed so as to make them more penal, but to let them have their proper effect.

Prec. in Ch.  
215.  
Attorney-  
General v.  
Sudell.

[Even statutes which take away clergy are in some cases to be taken by equity; and if a statute is made suppletory to the common law, and in a similar case, and takes away clergy, it must be construed liberally.]

10 St. Tr.  
436.  
Jenk. Cent.  
97.

#### 10. Some other Rules which ought to be observed in the Construction of a Statute.

Such construction ought to be put upon a statute as does not suffer it to be eluded.

Hussey. 3 Rep. 7. Hob. 97.  
Moore v. 11 Rep. 73.

Every statute ought to be construed for the preventing of delay as much as possible.

2 Inst. 611.  
614.

A statute ought to be so construed, that no man who is innocent be punished or endamaged.

1 Inst. 360.

No statute shall be construed in such manner as to be inconvenient or against reason.

Cart. 136.  
Hughes v.  
Hughes.  
1 Inst. 97. 5 Rep. Cawdrie's case.

By the 12 *Car. 2. c. 17.* all persons presented to benefices in the late times, who should conform as in the statute was directed, were to be confirmed therein, *notwithstanding any act or thing whatsoever*: yet it was holden, that the statute did not extend to the confirming of a person, who had been simoniacally promoted.

Sid. 232.  
Crawley v.  
Phillips.

If the meaning of a statute be doubtful, the consequences are to be considered in the construction: but, where the meaning is plain, no consequences are to be regarded in the construction; for this would be assuming a legislative authority.

10 Mod.  
344. The  
Queen v.  
Simpton.

Vaugh. 169, 170. If a statute be penned in dubious terms, usage is a just rule to construe it by; for *jus et norma loquendi* is governed by usage, and the meaning of words spoken or written ought to be allowed to be as it has constantly been taken to be: but, if the usage have been to construe the words of a statute contrary to their obvious meaning, such usage is not to be regarded; it being rather an oppression of those concerned than a construction of the statute.

2 Sid. 63. A statute which gives a new remedy ought not to have a liberal construction.  
Pool v. Neel.

Stra. 258. A statute creating a new jurisdiction ought to be construed strictly.  
260. Pierce v. Hopper.  
10 Rep. 75.

Bunb. 106. It has been holden, that the 6 G. 1. c. 21. which gives the commissioners of excise a jurisdiction to condemn in a summary way certain goods therein mentioned, ought to be construed strictly; because it breaks in upon the ancient jurisdiction of the court of Exchequer.

2 Mod. 57. A private statute ought not to have a liberal construction.  
Threadneedle v. Lynam.

### (K) How a Person guilty of Disobedience to a Statute may be punished.

1 Inst. 159, 3 Lev. 290. **W**HEN a statute giveth a forfeiture or penalty, against him who wrongfully detaineth or dispossesteth another of his duty or interest, he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law; for the king shall not have the forfeiture in such case; and so it was adjudged in the Exchequer upon conference with the other judges, in an information for the treble value for not having set out tithes at *Ichington* in the county of *Cambridge*.

2 Inst. 55. As every statute made against an injury, mischief, or grievance, does impliedly give a remedy; the party injured, if no remedy be expressly given, may have an action upon the statute.

2 Mod. 26. Anon. If a statute command or prohibit a thing for the advantage of a particular person, that person shall have an action upon the statute, to recover satisfaction for an injury done him contrary thereto; for it would be strange that there should in such case be no remedy except in a court of equity.

Poph. 175. Welden v. Vesey. If a penalty be given by a statute, but no action for the recovery thereof be given, an action of debt will lie for the penalty.

2 And. 127, 128. Agard v. Tandish. If a thing be prohibited by a statute under a certain penalty, and the penalty, or any part of it, be given to him who will sue for the same, any person may bring an action or information for the penalty.  
2 Hawk. c. 26. § 17.

Salk. 178. Walwyn v. Smith. If the penalty given by a statute is to be recovered in a court of record, this can only be recovered in one of the superior courts.



at *Westminster*; for being a penal law it ought to be construed strictly, and these are the courts in which the king's Attorney-General is supposed to attend.

If an action upon a statute giving a penalty be brought against several defendants, only one penalty can be recovered.

Cro. Eliz.  
480.  
Partridge v. Naylor.

But, if a conviction be upon a statute giving a forfeiture, each defendant must pay the forfeiture: for the forfeiture in such case is not in the nature of a satisfaction to the party injured, but a punishment of the offender; and although debts be joint, crimes are several.

Salk. 182.  
The Queen  
v. King.

When a statute commands or prohibits a thing of public concern, the person guilty of disobedience to the statutes, besides being answerable in an action to the party injured, is likewise liable to be indicted for the disobedience.

Cro. Eliz.  
635.  
Croucher's  
case. 2 Inst.  
131. 163. 1 Hawk.  
c. 22. § 5.

If the thing commanded or prohibited by a statute can only be prejudicial to one or two persons, as, if it be to repair the bank of a river, for want of having done which the ground of a certain person has been overflowed, no indictment lies; the remedy being by an action upon the case.

2 Sid. 209.  
Rex v.  
Pawlyn.

If a statute, although it extend to all persons, chiefly concern disputes of a private nature, as those relating to distresses between lords and tenants, an offence against the statute is not indictable.

1 Mod. 71.  
Rex v. Le-  
ginham.  
Ibid. 288.

If a statute inflict a new punishment upon the person guilty of an offence, before punishable at the common law, the offence is still punishable as it was before the making of the statute. The crime of forgery, notwithstanding the 5 *Eliz.*, is at this day punishable in the same manner as it was at the common law.

Fitzg. 66.  
Rex v.  
Woolston.  
10 Mod.  
337.

An indictment against a person for having acted as a justice of peace, whereas he had not lands to the value of forty pounds *per ann.*, was holden to be bad; because this is a new offence, and the method of recovering the penalty given is prescribed in the statute; and by the court—Where a statute creating a new offence gives a penalty, and directs how it shall be recovered, the offence cannot be punished in any other way than that directed by the statute.

Cro. Jac.  
643.  
Cattle's case.  
Mich.  
21 Jac. 1.

Since this case it has been holden, that if the thing commanded or prohibited by a statute be of public concern, an offender against the statute may be indicted, although the offence be a newly-created one, and the method directed for recovering the penalty given be not indictment; for that the giving of other affirmative remedies shall not, unless these words, *and not otherwise*, are added, take away the general way of proceeding which the law has appointed for the offence.

1 Mod. 34.  
Crofton's  
case. Hil.  
21 Car. 2.  
1 Vent. 65.  
S. C.

The former, however seems to be the better opinion; for it is laid down in divers books, that if a statute creating a new offence appoint a particular method of proceeding against the offender, as by commitment or information, without mentioning an indictment, no indictment lies; because, as other methods of proceeding

2 Hawk.  
c. 25. § 4.  
Show. 398,  
399.  
Fitzg. 47.

are

are expressly mentioned, that by indictment seems to be excluded by implication.

1 Burr.

545.

Rex v.

Wright.

[See too Rex v. Penfax, 1 Barnard. B.R. 127. Rex v. Robinson, 2 Burr. 803. Rex v. Boyall, *Id.* 834.]

Rex v.

Harris,

4 Term Rep.

202.

[Where a new offence is created by a statute, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause by indictment, on the ground of its being a misdemeanour.]

2 Hawk.

c. 25. § 4.

It has been holden, that if a statute creating a new offence and inflicting a penalty, provide, that the penalty may be recovered by action, bill, plaint, information, or *otherwise*, an indictment will lie upon the statute.

Stra. 828.

Rex v.

Mallard.

By the 12 G. 1. c. 35. a penalty of twenty shillings *per* thousand is given for burning place-bricks and stock-bricks together; but there is no appropriation of the penalty, nor is any method of recovering it directed. Upon a demurrer to an indictment for this offence, the court held, that this, like every unappropriated penalty, is in the nature of a debt to the crown, and recoverable by action in a court of revenue; but that an indictment does not lie.

## (L) Of pleading a Statute.

### 1. A publick Statute.

4 Rep. 76.

Holland's

case. Bro.

Parl. pl. 69.

2 Roll. Abr. 465. Cro. Eliz. 601. Doct. pl. 337.

A Publick statute may be pleaded without reciting it: for the rule of law is, that the judges are *ex officio* bound to take notice of every publick statute.

2 Rep. 28.

The Prince's

case.

Cro. Car.

355.

Upon this principle, that the judges are bound to take notice of every publick statute, it is holden, that *null tiel record* cannot be pleaded to a publick statute: and by the court—God forbid, that if the record of a publick statute should be lost or destroyed by fire, this should tend to the prejudice of the commonwealth. In such case, the judges may, from some printed copy, or from some record in which it has been pleaded, or in some other way, inform themselves of the contents of the lost or destroyed statute.

10 Rep. 57.

The Chan-

cancellor of Ox-

ford's case.

Hob. 227.

If part of a statute be publick, and the residue thereof private, there is no necessity that the part which is publick should be recited in pleading.

Sid. 24.

### 2. A private Statute.

4 Rep. 76.

Holland's

case.

2 Roll. Abr.

466. 2 Mod. 57. Doct. pl. 33.

If a private statute be pleaded, it must be recited; for, unless this be done, the judges cannot take notice of any thing therein contained.

It

It is in the general true, that if a private statute be pleaded, *nul tiel record* may be replied: but, if the exemplification of a private statute under the great seal be pleaded, *nul tiel record* cannot be replied.

H. H. C. L.  
16.  
8 Rep. 28.  
The Prince's  
case.

### 3. Some general Rules for pleading a Statute.

In pleading a statute, it is not necessary to recite the title; because this is no part of the statute.

Ld. Raym.  
77. Chance  
v. Adams.

In pleading a statute, it is not necessary that the preamble should be recited; for this, although it usually contain the motives of making it, is no part of the statute.

6 Mod. 62.  
Mills v.  
Wilkins.  
8 Mod. 144.

If a statute make certain circumstances necessary to the validity of an act, which was valid at the common law without such circumstances, this does not alter the manner of pleading, which was used before the making of the statute.

12 Mod.  
540.  
Birch v.  
Bellamy.

A tenant for years cannot since the 29 *Car. 2. c. 3.* assign over his term without doing it in writing; but, as he might have done this by parol at the common law, an assignment may be pleaded without alleging it to have been in writing; and it may be given in evidence that it was in writing.

*Ibid.*

Where the power to do an act was originally granted by a statute, it must be shewn in pleading the statute, that the act was done according to the direction of that statute, and of every subsequent statute relative to the subject.

*Ibid.*

If a will of lands be pleaded, it must be shewn, that the will is in writing, as by the 32 *H. 8. c. 1.* by which power to make such will was first given, is directed: and it must be likewise shewn, that the requisites, made necessary to the validity of such will by the 29 *Car. 2. c. 3.* have been complied with.

*Ibid.*

When a temporary statute, which has expired, is continued by a subsequent statute, it is sufficient to plead the former, without taking any notice of the latter.

Strat. 1066.  
Rex v.  
Morgan.

If one statute have prohibited the doing of an act, and another be afterwards made, which inflicts a forfeiture on the person who shall do the act, the person who sues for the forfeiture must plead both statutes.

Plow. 206.  
Stradling v.  
Morgan.

Exception was taken to a replication, that only part of a statute therein pleaded was recited, and it was insisted, that the whole statute ought to have been recited: but the whole court agreed, that the replication was good; for that no person is obliged to recite in pleading any more of a statute than the clause which makes for himself.

Plow. 106.  
Fulmerstone  
v. Steward.  
Plow. 65.  
410.  
Cro. Jac.  
140.  
2 Jo. 50.

But, if there be in that clause of an act of parliament, which is pleaded, any proviso or exception, this must be recited, although it should make against the party reciting it: for, as the proviso or exception is parcel of the clause which is pleaded, if this should be omitted, it would amount to a misrecital of the clause.

Plow. 410.  
Newys v.  
Lark.  
Bro. Plead.  
pl. 164.  
Ld. Raym.  
120.

[*Ude Spieries v. Parker*, 1 Term Rep. 141. *Rex v. Hall*, *Id.* 322.]

**Cro. Jac.** If one party have only pleaded such part of a statute as it was  
 140. for his interest to plead, the other party may plead any other part  
**Read. v.** of the statute.  
**Potter.**  
**Ld. Raym.** 120.

**Ld. Raym.** If in pleading a statute it be said, that the parliament, at which  
 210. the statute was made, continued *usque ad* a certain day, the words  
**Birt v.** *usque ad* in this case include the day to which they relate; for  
**Rothwell.** it is usual to say, that a parliament continued *usque ad* a certain  
 day, *quo die* it was prorogued; but in all other cases the day to  
 which they relate is excluded by the words *usque ad*.

#### 4. Some Rules for pleading a Statute, which relate to particular Parts of the Pleadings.

**2 Inst.** 121. If a statute give a new action, the statute must be recited in the  
**Bro. Act.** writ.  
**sur le Stat.**  
**pl. 47.** **Bro. Parl.** pl. 75.

**Bro. Act.** But, if a statute giving a new action ascertain the form of a  
**sur le Stat.** writ to be used, as is done by the statute giving a *formedon in*  
**pl. 47.** **Bro.** *descender* and by other statutes, it is not necessary to recite the sta-  
**Parl.** pl. 75. tute in the writ; for the writ itself is in such case in the words of  
 the statute.

**Ibid.** If an action which lay at the common law be given by a statute  
 in a new case, the statute by which it is given need not to be re-  
 cited in the writ.

**Ibid.** If an action of trespass be brought by an executor *de bonis af-*  
*portatis in vita testatoris*, there is no necessity that the writ should  
 recite the statute by which the action is given; because an action  
 of trespass lay at the common law in other cases.

**11 Mod.** If a statute in any case direct what shall be pleaded, the plea  
 207 **Hall v.** must be in the words of the statute.  
**Holliday.**

#### 5. Of Misrecital in pleading a Statute.

**Bro. Parl.** If one party in pleading a statute misrecite the matter, year,  
 pl. 87. day, or place, the other party may demur generally, there being  
**Cro. Jac.** no such statute; for he who takes upon him to recite a statute must  
 211. do it truly.  
**2 Hawk.**  
 c. 25. § 104.

**Plow.** 79. If a party recite a statute as made upon a certain day, which  
 84. was not made on that day, he has, although the statute be a pub-  
**Partridge v.** lick statute, failed: for he does not refer to the knowledge of the  
**Straunge.** judges, as he would have done if he had said against the form of  
**Bro. Parl.** the statute in such case provided. If he had said so, the law  
 87. would have referred the pleading to such statute as had been apt  
 for it; but, as he has recited a particular statute, if there be not  
 such statute, his pleading is grounded upon a thing which does  
 not exist.

**Plow.** 79. The 32 *H. 8. c. 9.* was recited to have been made at a parlia-  
**Partridge v.** ment holden the twenty-eighth day of *April* in the thirty-second  
**Straunge.** year

year of the reign of *Henry* the Eighth, whereas in truth the parliament began the twenty-eighth day of *April* in the thirty-first year of that prince's reign, and was continued by prorogation to the time of making this act. It was insisted that the misrecital was fatal: but it was holden, that it was not, and by *Hales, J.*—Every meeting of a parliament, after a prorogation, is a new session, and a statute can never relate further back than to the first day of the session in which it was made.

In an action of debt upon the statute of *E. 6.* for not having set out tithes, the plaintiff declared, that whereas the fourth day of *November* in the second year of the reign of *Edward* the Sixth it was enacted. It was said in arrest of judgment, that there is no such statute; because the parliament began in the first year of that prince's reign, and was continued by prorogation to the time of making this statute: but by the court—There are a thousand precedents to the contrary, and, as the constant usage has been to recite this statute as the plaintiff has done, we will not depart from that usage, the doing of which would disturb a great number of judgments.

The safest way of pleading a statute is to say, that it was made at a parliament holden upon a certain day of a certain year of a certain king's reign, without taking any notice of the commencement of the parliament: for the judges are bound to take notice of the commencement of every parliament, and likewise of its prorogations and sessions.

In pleading a private statute, there was a misrecital of the day of the commencement of the parliament in which it was made. This was holden to be fatal, upon a general demurrer; for, although the judges cannot, *ex officio*, take notice of the contents of a private statute, they are bound to take notice of the commencement of a parliament.

*notis.* So, where a private statute was described in the declaration to be made in the fourth year of Philip and Mary, whereas the record, when produced in evidence, appeared to be in the fourth and fifth of Philip and Mary, the variance was holden to be fatal, and the plaintiff was nonsuited. *Rann v. Green*, Cowp. 474.]

If a statute is recited to have been made at a parliament holden upon a day to which the parliament was adjourned, this is such a misrecital as is fatal: for, as an adjournment of a parliament does not put an end to a session, the meeting after the adjournment is only a continuance of the session.

It is said, that a misrecital of the day of making an act of parliament, which would have been fatal in a declaration, is not so in a plea in bar.

Repugnancy in reciting the day of making a statute is fatal: as, if it be said, that a statute was made on a certain day in the first and second year of the reign of a certain king; it being impossible, that the same day should be in two different years.

A statute was alleged to have been made upon the twelfth day of *November* in the sixth year of the reign of *William* the Third, whereas

*Yelv.* 126,  
127. *Oliver*  
*v. Collins.*  
2 *Mod.* 241.  
*Skin.* 110,  
111. *Cro.*  
*Jac.* 111.

*Ld. Raym.*  
210. *Birt*  
*v. Mason.*  
1 *Lev.* 296.  
*Ld. Raym.*  
343.  
*Lutw.* 140.

*Mo.* 551.  
The Bishop  
of *Norwich's*  
case. *Ld.*  
*Raym.* 210.  
343.  
1 *Lev.* 296.  
[*Dougl.* 97.

12 *Mod.*  
602.  
*Anon.*  
2 *Mod.* 242.  
*Ld. Raym.*  
343.

1 *Brownl.*  
196.  
*Woolsey v.*  
*Shepherd.*

*Mo.* 302.  
*Langly v.*  
*Haynes.*  
2 *Hawk.*  
c. 25. § 104.

*Ld. Raym.*  
1224.  
*Anon.*

whereas Queen *Mary* being at that time alive, it should have been in the sixth year of the reign of *William* and *Mary*. For this misrecital judgment was arrested.

Ld. Raym. 77. *Chance v. Adams*.  
Pasch. 8 W. 3. It has been holden, that as the title of a statute is no part of the statute, a misrecital of this is not fatal.

Hardr. 324. This case, which was in the court of Common Pleas, appears to have been determined upon the authority of one in the time of *Hale*, Ch. B. which had been determined the same way.  
The Attorney-General v. Hutchison. Pasch. 15 C. 2.

6 Mod. 62. But in a later case it was holden, that a misrecital of the title of a statute is fatal: and by *Holt*, Ch. J.—It is very true, that the title of an act of parliament is no more a part of the law than a title of a book is a part of the book; and there is, for that reason, no necessity to recite it: but, if a party do take upon him to recite the title of a statute, he thereby ties himself up to an act so entitled, and if he cannot produce it, he is gone. Notwithstanding my great veneration for him, I cannot agree with what is reported to have been said by *Hale* as to this point. *Gould*, J. agreed with the Ch. J. *Powell*, J. gave no opinion; but said, that he had concurred with the other judges of the Common Pleas, merely upon the authority of the opinion of *Hale* as reported in *Hardres*.

Cro. Eliz. 236. *Vanderplancken v. Griffith*.  
Cro. Car. 232. 2 Mod. 99. A publick statute need not be recited in pleading; but, if a party take upon him to recite a publick statute, and misrecite it, the misrecital is fatal.

Ld. Raym. 382. *Platt v. Hill*.  
Plow. 79. 84. Cro. Car. 233. *Freem*. 311. If, after pleading a publick statute, the conclusion be, *contra formam statuti in hujusmodi casu editi*, a misrecital is not fatal; for, as it was not necessary to recite the statute, the judges, although it be misrecited, will take notice of the true contents. But, if after pleading a publick statute the conclusion be, *contra formam statuti prædicti* or *vigore statuti prædicti*, a misrecital is fatal; for by the conclusion the pleading is tied up to the misrecited statute.

Cro. Eliz. 245. *Love v. Wotton*.  
[Dougl. 97. *Boyce v. Whitaker*.] A misrecital of a publick statute is so fatal, that the court, well knowing there is no such statute, cannot, even if both parties should consent, give judgment.

Sid. 356. *Hil*. 19. Car. 2. *Holby v. Bray*. A private statute being misrecited in pleading, the plaintiff demurred: but did not shew the misrecital for cause. The court doubted, whether, in the case of a private statute, they could, from a printed copy, or from the record, or in any other way, take notice, that the statute was not as the defendant had recited it; and the case was adjourned.

Ld. Raym. 382. *Mich*. 10 W. 3. *Platt v. Hill*.  
2 Mod. 241. It has been since holden, that, although a private statute be misrecited in pleading, the court must take it to be as recited, unless it is denied to be so by pleading *nul tiel record*; or shewn to be otherwise, by alleging how it ought to have been recited.

Every

Every misrecital of a statute in a material part is fatal.

Cro. Car.  
136. 522.  
2 Mod. 98.

Ld. Raym. 382.

The words of *the 8 H. 6. c. 9.* are, *if it be found by verdict, or in any other manner by due form of law, that the party, &c.* In reciting this statute the words, *or in any other manner*, were omitted. The misrecital was holden to be fatal; because the sense of the statute is thereby altered, it being tied up to a recovery by verdict only: but it was said, that if the misrecital had been of a part not material, the misrecital would not have been fatal.

Cro. Eliz.  
186. Farr  
v. East.  
Ld. Raym.  
382.

By the *8 Eliz. c. 2. § 3.* it is enacted, That *if any person shall cause any other person to be arrested to answer in any court, where any liberty or privilege is used to hold plea in any action or actions personal.* In reciting this statute the word *personal* was omitted. The misrecital was holden to be fatal; because the statute was recited as extending to all actions, whereas it did in truth extend only to personal actions.

Cro. Eliz.  
263. Van-  
derplanhen  
v. Griffith.  
Cro. Car.  
136.

A misrecital of a statute in an immaterial part is not fatal.

Cro. Car.  
136. 522.

Ld. Raym. 382. 2 Mod. 98. [But *qu.* if it be set out unnecessarily, for in that case the materiality of the misrecited part seems not to be considerable; the court will hold the party to half a letter. Doug. 97. and vide *Mills v. Wilkins*, supra.]

In an action of false imprisonment, the defendant justified under the *1 M. c. 3.* which statute was recited in these words, *if any person shall maliciously and contemptuously molest.* It was upon a general demurrer insisted, that the words of the act are in the disjunctive *maliciously or contemptuously*: but by the court—Where the word which precedes and the word which follows are of the same import, the disjunctive *or* means the same as the copulative *and*: but, if the two words are of different import, as *by word or deed*, it is otherwise. Another part of this act was thus recited, *by the said justices or by the better part of them.* To this recital it was objected, that the words are *by the said justices or by the more part of them*: but the objection was over-ruled.

Godb. 246.  
Croffe v.  
Stanhope.  
2 Bult. 47,  
48, 49.

The words of the statute of *Winchester* are, *forasmuch as from day to day robberies, murders, burnings and theft be more often used.* In an action upon this statute, brought by a person who had been robbed, the recital was in these words, *forasmuch as from day to day robberies, murders, burning of houses, and theft be more often used*: But, as the plaintiff's case was founded upon a robbery, the court were unanimously of opinion, that the misrecital was not fatal.

2 Mod. 99.  
2 Jon. 51.

A misrecital of a publick statute is not cured by a verdict: nor can the court, who are bound to take notice of the contents of every publick statute, give judgment; because they know the statute to be otherwise.

Cro. Eliz.  
245.  
Love v.  
Wotton.

It is laid down, that a misrecital of a publick statute, in a part which does not go to the ground of the action, is after a verdict cured by the statute of jeofails.

Styles,  
Boomer v.  
Cleve.

A misrecital of a private statute is cured by a verdict: for advantage should have been taken of the misrecital, by pleading *null tiel record*, or by shewing the statute to be otherwise.

Ld. Raym.  
382. Place  
v. Hill.  
2 Mod. 247.

## 6. Of Surplufage in pleading a Statute.

Bro. Nug.  
& Surpl.  
pl. 8.

An act of parliament, for the reftitution of an heir after the attainder of his ancestor for treason, enabled the heir to enter. He did enter, and brought a *scire facias* againft *J. N. quare terra refumi non debet, et liberari querenti*. The word *refumi* was not in the act: yet the better opinion was, that the furplufage, although in a judicial writ, was not fatal.

## Summons and Severance.

THIS title is diftinguifhed in the books by the name of *Summons and Severance*: but the proper name of it is *Severance*; for the summons is nothing more than a procefs, which muft in certain cafes iffue before judgment of severance can be given.

It will here be proper to fhew,

- (A) The Necessity of Judgment of Severance in fome Cafes.
- (B) By whom Judgment of Severance may be given.
- (C) Where a Summons muft iffue, before Judgment of Severance can be given.
- (D) At what Time Judgment of Severance muft be prayed in a Writ of Error.
- (E) Who may pray Judgment of Severance.
- (F) In what Actions Judgment of Severance may be given.
- (G) Where the Writ abates notwithstanding there is Judgment of Severance.
- (H) The Confequence of Judgment of Severance to the Party fevered,



(A) The Necessity of Judgment of Severance in some Cases.

**I**T is a rule of law, that if two or more have a joint right to a thing, they must join in an action for the recovery thereof.

Joint-tenants must emplead jointly: for they claim under one title. 1 Inst. 120.

Parceners, who make but one heir, must, in order to recover the possession of their ancestor, join in one præcipe. 1 Inst. 163, 164.

Executors, because the right of their testator devolves on all of them, must join in an action for the recovery of any thing due to their testator. Godolph. Orph. Leg. 134. Salk. 3. Carth. 61.

If two or more persons, who have a joint right of action, have not all joined in an action which is brought, the defendant may plead in abatement for if any one could recover in such case singly, every other might; the consequence of which would be, that the defendant would be liable to answer in divers actions for the same matter. Cro. Eliz. 54. Deering v. Moor. 9 Rep. 37. Salk. 3. 32. 2 Lev. 113. 3 Lev. 354. 1 Mod. 102.

It is indeed in the power of one or more of the persons, who have a joint right of action, to commence a suit in the name of all in whom the right is: but, notwithstanding a plea in abatement would be thereby prevented, it would still be in the power of any one of them, by neglecting to appear, or by refusing to proceed afterwards in the suit, to render it fruitless. 1 Inst. 139. Bro. Summ. and Sev. pl. 17.

For if an action be brought in the name of two or more, and one make default, the nonsuit of him is the nonsuit of all. Bro. Summ. and Sev. pl. 2. pl. 5. pl. 7.

So, if a writ of error be brought in the name of two or more, the assignment of error cannot be by one without the other or others. Cro. Eliz. 892. Andrews v. Ld. Cromwell.

To prevent the inconvenience and the failure of justice, which would be, if all the other persons having a joint right of action should be precluded by the negligence or collusion of one from having the effect of a suit, the law has provided, that if one of the persons, in whose name a joint action is commenced, do not appear, or do after appearance make default, the other or others may have judgment *ad sequendum solum*, or in other words judgment of severance. Hard. 313. Man'ey v. Lovell. Bro. Summ. and Sev. pl. 4. pl. 16.

If two bring an assize, and one come not at the day, a summons *ad sequendum simul* may issue; and if the party summoned do not appear at the return of the summons, the other party may pray judgment *ad sequendum solum*. Bro. Summ. and Sev. pl. 4. pl. 18.

If eight have joined in an assize, and five of them are nonsuited, or will not sue, judgment of severance may be had against the five. Bro. Summ. and Sev. pl. 16.

Fitz. N. B.  
128.  
1 Inst. 139.

If in a writ of *quæ jure* by two, one make default, judgment of severance may be had by the other; in which case the nonsuit of the one shall not be the nonsuit of the other.

After judgment of severance against one or more of the plaintiffs in an action, the other plaintiff or plaintiffs may proceed in the suit.

### (B) By whom Judgment of Severance may be given.

Bro. Summ.  
and Sev.  
pl. 10.  
2 Roll. Abr.  
489.

**J**USTICES of *nisi prius* have no power to give judgment of severance; for such judgment can only be given by the justices of the court in which the record is.

### (C) Where a Summons must issue, before Judgment of Severance can be given.

1 Inst. 139.  
Bro. Summ.  
and Sev.  
pl. 10.  
2 Roll. Abr.  
488.

**I**F two or more are joint plaintiffs in an action in which there may be judgment of severance, and one of them has not appeared, he must be summoned before judgment of severance can be given against him; because a writ may have been purchased in a person's name without his privity.

Bro. Summ.  
and Sev.  
pl. 10.  
10 Rep. 135.  
Hard. 317.

But, if two or more joint plaintiffs in an action have both appeared, and afterwards one make default, the court may, without a previous summons, give judgment of severance against him.

### (D) At what Time Judgment of Severance must be prayed in a Writ of Error.

Cro. Jac.  
117.  
Blunt v.  
Snedstone.

**J**UDGMENT of severance cannot be given in a writ of error, unless it be prayed before the defendant has pleaded in *nullo est erratum*.

2 Lilly Pr.  
Reg. 663.

But such judgment may be given after a joinder in the assignment of error.

### (E) Who may pray Judgment of Severance.

Bro. Summ.  
and Sev.  
pl. 17.

**I**F two of four joint-tenants disseise the other two, the two, who are disseised, may bring an assize in the name of the four, and may have judgment of severance against the two disseisors.

5 Mod. 150,  
151. Pullen  
v. Palmer.

Judgment of severance may be prayed by one joint-tenant against any other joint-tenant who has joined in an avowry.

Noy, 1.  
Farmer v.  
Downes.

But, where two joint-tenants, who had acknowledged a statute upon which their land was taken in execution, did afterwards join in bringing an *audita querela* upon the statute, it was holden, that judgment of severance could not be given; for the wrong done

to one by taking the land in execution being no wrong to the other, they ought not to have joined, but each ought to have brought an *audita querela*.

One tenant in common cannot in the general pray judgment of severance; for, as the titles of tenants in common are distinct, they are not in the general obliged to join in an action: but one tenant in common may pray judgment of severance in an action of *quare impedit* for the recovery of an advowson; because, as an advowson is not divisible, tenants in common must join in that action.

If two or more parceners have joined in an action for recovering the estate of their ancestor, judgment of severance may be prayed; because they could not avoid joining in such action.

If a person having two daughters be disseised, and the daughters die leaving issue, any of their issue may pray judgment of severance: for, as a joint right descended upon them from their common ancestor, they must all join in a *præcipe*; and it makes no difference, whether the ancestor, seeing he was out of possession, died before the daughters or after; for in either case the issue must make themselves heirs to the person last seised.

But, if the two daughters had in this case been actually seised, and afterwards disseised, none of their issue could have prayed judgment of severance; because, as distinct estates descended from several ancestors, it was not necessary for the issue to join in a *præcipe*.

Judgment of severance may be prayed in an action of trespass by executors for an injury done to the goods of their testator; because, as in representing him they make but one person, they must all join in such action.

If two or more persons, who have joined in a writ of error, were under a necessity of joining therein, judgment of severance may be prayed.

No judgment of severance can be prayed in a case wherein two or more persons, who might have brought separate actions, have joined in an action; for it was their folly so to do.

If four persons join in an action of *quare impedit* for the recovery of an advowson, and one vary from the others in making title to the advowson, judgment of severance cannot be prayed, but the writ shall abate; for they ought not to have joined in the action, unless their title had been joint.

*A.*, *B.*, and *C.* being jointly seised of certain premises made a lease thereof to *D.* for life; and afterwards *B.* and *C.* released to *A.* In an action of waste by *A.* the lease was pleaded by *D.* in abatement; and it was insisted that *B.* and *C.* ought to have been joined in the action: but it was holden, that as the right of *B.* and *C.* was gone by the release, *A.* might sue without them.

2 Inst. 197.  
5 Mod. 11.

1 Inst. 164.

*Ibid.*

Bro. Coparc.  
pl. 2.  
1 Inst. 164.

Godolph.  
Orph. Leg.  
134.  
Carth. 61.  
Salk. 3. 9.  
9 Rep. 37.

6 Rep. 25.  
Ruddock's case. Cro.  
Eliz. 892.

2 Roll. Abr.  
488.  
6 Rep. 25.

Bro. Quar.  
Imped. pl. 2.

Bro. Summ.  
and Sev.  
pl. 6.

## (F) In what Actions Judgment of Severance may be given.

**J**UDGMENT of severance may be given in an assize; in a writ of coſuage; in a writ of *quo jure*; and in all real actions.

1 Inſt. 139.  
Bro. Judg.  
pl. 144.  
Keilw. 47.

10 Rep. 135. Judgment of severance cannot be given in a writ of *quid juris clamat*; becauſe the tenant ſhall not be compelled to attorn to one perſon.

1 Inſt. 286.  
Bro. Chart.  
de Terre,  
pl. 74.

Judgment of severance may be given in an action of detinue of charter: for this action ſtandeth in the realty.

Bro. Summ.  
and Sev.  
pl. 20.

But judgment of severance cannot be given in an action of chamberty; becauſe this action, as only damages can be recovered therein, is perſonal.

1 Inſt. 139.  
Bro. Chart.  
de Terre, pl. 74.

Judgment of severance may be given in all mixed actions.

Keilw. 47.

Judgment of severance may be given in an *ejectione firme*, becauſe the land itſelf, as well as damages, may be recovered in the action.

Bro. Summ.  
and Sev.  
pl. 9. 2 Roll.  
Abr. 488.

And for the ſame reaſon judgment of severance may be given in an action of waſte.

1 Inſt. 139.  
Bro. Chart.  
de Terre,  
pl. 74. Bro. Summ. and Sev. pl. 8. Cart. 191.

It is in the general true, that judgment of severance cannot be given in a perſonal action.

Gilb. Hiſt.  
C. P. 196,  
197.  
Cro. Eliz.  
649.  
*Ibid.*

If a treſpaſs be committed upon the eſtate of two joint-tenants, they muſt join in an action; yet no judgment of severance can be given: for, as either might have releaſed the damages, either may reſuſe to carry on a ſuit for the recovery of damages.

If an action of debt be brought by two obligees of a bond, judgment of severance, although they muſt join in the action, cannot be given: becauſe either may diſcharge the debt; and the law does not provide for a caſe, in which one man has by his own folly put himſelf into the power of another.

Cart. 191.  
Rickfield v.  
Udall.  
Went. Off.  
of Exec. 96.  
104.

But judgment of severance may be given in a perſonal action brought by two or more executors; for although any one of them may give a releaſe, the releaſe would be a *devaſavit* in him: but, as the reſuſing to join in carrying on the ſuit is not a *devaſavit*, if judgment of severance could not be given, any one of them may, by colluding with the debtor, prevent the recovery of a debt due to his teſtator, without being guilty of a *devaſavit*.

Hard. 317.  
Manly v.  
Lovell.  
2 Roll. Abr.  
488.

If two executors however declare in an action of trover for a bond loſt in the time of their teſtator, but lay the converſion after his death, judgment of severance cannot be given; becauſe as the converſion, which is the giſt of this action, was in their own time,

it

it is like an action of trespass upon their own possession, in which judgment of severance cannot be given.

Judgment of severance may be given in an action of attain upon a real action; for wherever such judgment might have been given in the principal action, it may in an action of attain founded upon that action.

Judgment of severance may be given in a suit upon a writ of error, or in a suit upon a *scire facias*, provided it might have been given in the original action; for these actions, although personal, shall follow the nature of the actions upon which they are founded.

Judgment of severance may sometimes be given in suit upon a writ of error, although it could not in the original action.

Cro Jac. 177. 616. Cro. Eliz. 649.

The distinction seems to be, that if any thing may be recovered by two or more plaintiffs in a writ of error, judgment of severance cannot be given; but where a writ of error is brought by two or more plaintiffs to discharge themselves from some burden, judgment of severance may be given.

If two plaintiffs in an action of debt are barred by an erroneous judgment, and costs are taxed against them, and they afterwards bring a writ of error to get rid of the costs, judgment of severance cannot be given; because, as either of them might before judgment have released the original action, it is now in the power of either of them to give a release of error, which shall bind the other.

But, if divers are defendants in an action, and judgment is against them, and they bring a writ of error to discharge themselves of the costs and damages of the action, judgment of severance may be given: for, although the costs and damages are a mere personal duty, it would be hard, that a release of error by one, with whom the others are compelled to join in bringing a writ of error, should be prejudicial to the others. nay, this would put it into the power of a plaintiff, to secure himself always against a writ error, nothing more being necessary, than to make some person, upon whom he can depend to collude with him, a defendant in the action.

It has been holden, that if there be judgment of outlawry against two, a writ of error to reverse the judgment must be in the name of both; that if only one appear, judgment of severance may be given against the other; and that the judgment in the original action may in such case be reversed for the benefit of him who does appear.

This determination, if not mistaken by the reporter, seems to have been a hasty one; for it is laid down, and in books of the best authority, that where four had joined in a writ of error to reverse a judgment of outlawry, and two of them had made default, judgment of severance could not be given. because, as they might have had several writs of error, it was their folly to join in one writ.

1 Inst. 139. Judgment of severance may be given in a suit upon a writ of  
 Bro. Summ. *audita querela*, brought by two upon a judgment in a personal  
 and Sev. action: for, as the suit is by way of defence, it would be hard,  
 pl. 2. that the nonsuit of one should be the nonsuit of the other.  
 6 Rep. 25.  
 Cro. Eliz.  
 649. Cro. Jac. 616.

Godb. 59. It is said, that judgment of severance may be given in an action  
 Giles's case. upon the case, *quare exaltavit flagnum, per quod suum pratum fuit  
 inundatum*.

### (G) Where a Writ abates after Judgment of Severance.

10 Rep. 134. IF two joint-tenants join in a suit upon a writ of *scire facias*, and  
 Read v. one die after judgment of severance, the suit does not abate;  
 Redman. because it is founded upon a judicial writ.

Cro. Car. But, if two joint-tenants join in a real action, and one die after  
 574. Rex v. judgment of severance, the action does abate; because it is founded  
 Dryden. upon an original writ.  
 10 Rep. 134.  
 Cro. Jac. 19.

10 Rep. 134. For the same reason, if two parceners join in a real action,  
 Read v. and one of them die after judgment of severance, the action does  
 Redman. abate.  
 Cro. Jac. 19.  
 Cro. Car. 574.

11 Rep. 45. The reason why an original writ abates in the two latter cases  
 Godfrey's is, that the survivor, who upon the death of the other became  
 case. entitled to the whole, may have an original writ to recover the  
 10 Rep. 134. whole: for if an original writ, which when it was sued out was  
 1 Saund. 285. proper, become afterwards untrue or unfit for the party's case,  
 and he may have another original writ which agrees with the real  
 truth of his case, the original writ does abate, notwithstanding  
 the alteration was occasioned by the act of God; because the law  
 will not suffer a party to recover under an original writ, the  
 words of which are false or unfit for his case.

10 Rep. 134. But, if an original writ become after judgment of severance un-  
 Read v. true or unfit for the party's case by some act of his own, the writ  
 Redman. does not *ipso facto* abate, it being only abateable; because it would  
 in such case, provided there had been no judgment of severance,  
 have only been abateable.

1 Inst. 197. If two parceners or two joint-tenants join in a writ *quare im-*  
 286. *pedit*, for the recovery of an advowson, and one die after judg-  
 10 Rep. 134. ment of severance, the writ, notwithstanding it is an original writ,  
 [The reason does not ap-  
 here given, pear in the  
 does not ap- books refer-  
 pear in the red to, nor  
 books refer- are all the  
 red to, nor references applicable even to the subject.]  
 ed to, nor references applicable even to the subject.]

If two persons join in a writ of error brought to reverse a judgment, and one die after judgment of severance, the writ, although it be an original writ, does not abate: because, as the design of the plaintiffs is only to discharge themselves of a judgment, the deceased party could not, although there had been no judgment of severance, have released the error.

10 Rep. 135.  
Read v.  
Redman.  
6 Rep. 25.  
Cro. Eliz.  
649.  
Cro. Jac.  
117. 616.

The death of one of the plaintiffs after judgment of severance in a suit upon a writ, *audita querela* does not abate the writ, although it be an original writ, because nothing can be recovered in the suit; the design thereof being only to get rid of a charge to which the plaintiffs are liable.

1 Inst. 139.  
Cro. Eliz.  
448.  
Cro. Jac. 19.  
6 Rep. 256.  
10 Rep. 135.

If an action of debt be brought by two executors, and one die after judgment of severance, the writ does not abate: for the right of the survivor, who might, if the other had lived, have recovered the whole debt, is not thereby altered.

Cro. Eliz.  
652.  
Anon.  
10 Rep. 135.  
Hard. 317.

Went. Off. of Exec. 96. 104.

A writ does not abate, after judgment of severance, because the party against whom judgment has been given was an alien; for advantage should have been taken of this in pleading.

Bro. Brief,  
121.

## (H) The Consequence of Judgment of Severance to the Party severed.

THE power, which a party against whom judgment of severance has been given, had over an action, is thereby so entirely at an end, that his name can never after be made use of in any of the proceedings.

Bro. Proc.  
pl. 12.  
2 Roll. Abr.  
489.

An action of debt had been brought by six executors, but there was afterwards judgment of severance against three of them; and final judgment was entered in the names of the three who had proceeded in the suit. It was assigned for error, that the other three, notwithstanding the judgment of severance, were still executors, and consequently, that they ought to have been named in the final judgment: but the court held, after ordering precedents to be searched, that the final judgment ought to be entered only in the names of the executors who had proceeded in the suit.

Cro. Car.  
420.  
Price v.  
Parkhurst.  
2 Roll. Abr.  
98.

Two executors had joined in an action; but there was judgment of severance against one of them. The other proceeded to final judgment, and then died. As the survivor was no party to the final judgment, it was holden, that he could not take out execution upon it.

Wentw. Off.  
of Exec.  
104, 105.  
Dal. 51.  
pl. 17. 53.  
pl. 30.

One executor may indeed, although judgment of severance be given against him, release the debt, for which an action is brought in the name of him and another executor, at any time before final judgment: but this does not proceed from any power he has over the action, but from an interest which he still has in the debt. The presumption of law is moreover, that, as he is liable to answer for the debt so released, it being a *devastavit*, his co-executor is not thereby injured.

Godolph.  
Orph. Leg.  
134.  
Dal. 51.  
pl. 17. 53.  
pl. 30.  
Wentw. Off.  
of Exec. 104.

Jenk. 211.  
pl. 46.

If a writ of partition be brought in the name of three parceners, and there be judgment of severance against one, that party shall, notwithstanding the judgment, have a third part of the estate; the design of the suit being to make partition of the estate.

## Superfedeas.

**A** *Superfedeas*, in the strict sense of the word, means the setting aside or annulling of an act.

But the word in its legal acceptation, means the preventing, as well as the setting aside or annulling of an act.

The matter which falls properly under this title shall be ranged in the following order :

- (A) Of the different Kinds of Superfedeas.
- (B) Who may award a Writ of Superfedeas.
- (C) In what Cases a Writ of Superfedeas may be awarded.
- (D) Of certain Writs which are Superfedeases by Implication.
  - 1. Of a Writ of *Audita Querela*.
  - 2. A Writ of second Deliverance.
  - 3. A Writ of *Habeas Corpus ad faciendum & recipiendum*.
  - 4. A Writ of *Certiorari*.
  - 5. A Writ of Error.
- (E) Of certain Requisites, which are necessary to the making of a Writ of Error a Superfedeas.
  - 1. It must be allowed.
  - 2. Bail must be put in thereto.
  - 3. It must be proceeded in without Delay.
- (F) To what Time a Writ of Error relates as a Superfedeas.
- (G) What the Effect of a Superfedeas is.
- (H) How Disobedience to a Superfedeas may be punished.



## (A) Of the different Kinds of Superfedeas.

**A** *Superfedeas* is sometimes exprefs, at other time it is implied.

An exprefs *superfedeas* may be by writ, or without writ.

When it is by writ, the person, to whom the writ is directed, is commanded, to forbear the doing of an act therein mentioned; or, if the act have already been done, to annul it as far as possible.

If an exigent have been awarded against a person, he may have a writ directed to the sheriff, commanding him, upon the person's finding sureties to appear at the return of the exigent, that if he have not arrested him, he do not arrest him, but suffer him to go in peace; and that if he have arrested him, he discharge him. Fitzh. N.B. 236.

Or the person against whom an exigent has been awarded may, upon finding sureties in a court which has power to award it, have a writ of *superfedeas*, directed to the sheriff, to the same effect. Ibid.

An exprefs *superfedeas* without writ is, where a person who has pursuant to an authority in him vested, made an order for the doing of an act, does, by a second order, forbid the doing of the act.

If a justice of the peace have made an improper order, he may, upon finding that he has so done, by a second order *superfedeas* the former order. Stra 6. The Inhabitants of

Pancras v. The Inhabitants of Rumbald.

But, if the act directed by the former order to be done were done before the delivery of the second order, it is doubtful whether this shall annul the act; and it may perhaps be proper, that only a writ of *superfedeas* should have a retrospective power.

Every writ is a *superfedeas* by implication, by which, although no writ of *superfedeas* have issued thereupon, the doing of an act is prevented.

But a writ, which is only a *superfedeas* by implication, cannot annul an act, which was done before the writ issued.

## (B) Who may award a Writ of Superfedeas.

**A** Writ of *superfedeas* does not lie from any other court to the court of Chancery; but this court may award a writ of *superfedeas* to a writ from the same court.

If one person have sued out a writ of *supplicavit* from the court of Chancery, for arresting another to find sureties of the peace, the person against whom this writ is awarded, may have a writ of *superfedeas* from the same court, commanding the sheriff to forbear to arrest him. Fitzh. N.B. 238.

A writ of *superfedeas* may at any time be awarded from the court of Chancery to any other court.

A *capias ad satisfaciendum* having issued from the court of King's Bench, a writ of *superfedeas* was awarded by the court of Chancery, commanding the justices of that court to surcease. This writ was Bro. Superf. pl. 5-

was by some thought to be contrary to the law: but *Finch*, because it was out of a higher court, did surcease, and no further proceedings were had.

Bro. Peace,  
pl. 17. If, after surety of the peace have been granted by the court of King's Bench, a writ of *superfedeas* come from the court of Chancery to the justices of that court, their power is at an end.

Any court of record at *Westminster* may in term-time award a writ of *superfedeas*, to any writ or process which has issued from the same court; or to the proceedings of any other court, in case the other court have proceeded in a matter properly conusable in the court from whence the writ of *superfedeas* is awarded.

Fitzh. N.B.  
236. If a *capias* or an exigent have been awarded against a person, he may in term-time have a writ of *superfedeas* out of the court which awarded it,

Bro. Superf.  
pl. 13.  
Fitzh. N.B.  
239. If after a person, who is sued in a court Christian, have obtained a writ of prohibition, the spiritual court proceed to excommunication, he may in term-time have a writ of *superfedeas* out of the court, from which the writ of prohibition was awarded.

Salk. 293.  
Rex v.  
Fowler. Heretofore a writ of *superfedeas* to a writ *de excommunicato capiendis* could only be had from the court of Chancery, unless the court Christian had proceeded after the awarding of a writ of prohibition: but, as every writ *de excommunicato capiendis* must, pursuant to the 5 *Eliz. c. 23.* be entered of record in the court of King's Bench, before it be delivered to the sheriff, and must likewise be returned to that court, a writ of *superfedeas* may at this day be awarded by that court.

Bro. Superf.  
pl. 38. If an accountant of the court of Exchequer be sued in the court of Common Pleas, the court of Exchequer may in term-time award a writ of *superfedeas* to the justices of the court of Common Pleas, commanding them to surcease.

*Ibid.*  
[(a) The junior baron used to carry the writ-book of the Exchequer to the court of King's Bench, and shew it to them, and there demand cognizance of the suit, in consequence of which the court surceased. But this practice, which arose from this odd technical reason, that the king cannot command himself, has fallen into disuse, as indeed has the practice of sending a *superfedeas* to the court of Common Pleas; all actions in which the revenue is concerned, being removed as well out of the courts of King's Bench and Common Pleas, as out of every other court having jurisdiction, into the office of pleas of the court of Exchequer, simply by an order of that court, which operates in the nature of an injunction. Anstr. 207, 208.]

The court of Exchequer cannot award a writ of *superfedeas* to the justices of the court of King's Bench; because the pleas in the latter court are before the king himself: but the record of the court of Exchequer may be shewn to the court, and if the person therein sued appear to be an accountant of the court of Exchequer, the court of King's Bench will dismiss the suit (a).

Bro. Superf.  
pl. 11. If, after the plaintiff have recovered in an action of debt upon a bond in the court of Common Pleas, the defendant bring a writ of error in the King's Bench, and the plaintiff, pending the writ, bring another action of debt upon the same bond in the court of Common Pleas, this court cannot award a writ of *superfedeas* to the second action: but the court of King's Bench may.

By the 2 *E. 3. c. 8.* it is provided, "That it shall not be commanded by the great nor little seal to disturb or delay common  
" right;

“right; and though such commandment do come, the justices shall not therefore surcease to do right in any point.”

In an action of trespass there was judgment for the plaintiff, and a *capias* was awarded for the fine due to the king. And an exigent was afterwards awarded. Hereupon the defendant obtained a writ of a *superfedeas* under the privy seal, commanding the justices to surcease all process for the king. The writ of *superfedeas* was holden to be consistent with the 2 E. 3. c. 8. for although the fine arose upon the suit of the party, the king may at his pleasure, as the *capias* was not executed, put a stop to all proceedings for his fine: but, if a defendant have in such case been arrested upon the *capias*, the king shall not, unless the plaintiff be satisfied, set him at liberty; for the plaintiff may elect to have the *capias* for his execution.

Bro. Superf.  
pl. 26.  
Fitzh. N.B.  
238.

An express *superfedeas* without writ can only be granted by the person or persons, who did the act which is intended to be superseded.

Two justices of the peace may by a second order supersede a former order made by themselves.

Stra. 6.  
The Inhabitants of Rumbold.

bitants of Pancras v. The Inhabitants

But a court of quarter-sessions cannot by their order supersede an order made by two justices of the peace.

Salk. 472.  
The Inhabitants of Woking.

Oswell v. The Inhabitants

The same justices, by whom restitution was awarded upon a conviction on an indictment for a forcible entry found before them, may, upon the insufficiency of the indictment appearing to them, supersede the award of restitution, in case it have not been executed.

1 Hawk.  
c. 64. § 61.  
Dyer, 187.  
H. H. P. C.  
140.

And it is said, that if the award of restitution were made by four or five justices, it may be superseded by any one or two of them.

Cro. Eliz.  
915. Fitzwilliam's case.

But it seems to be agreed, that no other justice or justices of the peace, nor other court whatsoever, except the court of King's Bench, have a power to supersede such award.

1 Hawk.  
c. 64. § 61.  
Dyer, 187.

If one justice of the peace have issued a warrant to compel a person to find surety of the peace, any other justice may, upon the person's entering into a recognizance before him for keeping the peace, supersede the former warrant.

1 Hawk.  
P. C. c. 66.  
§ 14.  
Lamb. 95,  
96. 99.

## (C) In what Cases a Writ of Superfedeas may be awarded.

**I**F a *capias* or an exigent have been awarded, the person against whom it was awarded may, whether he has or has not been arrested thereupon, have a writ of *superfedeas*.

Fitzh. N.B.  
236.

But if a person have been arrested upon a *capias ad satisfaciendum*, no writ of *superfedeas* lies; because he is taken in execution.

Fitzh. N.B.  
237.

If

3 Mod. 306. If a declaration be not filed against a defendant, who is in prison, within two terms, he may have a writ of *superfedeas*: but the Henley v. plaintiff may bring a second action; for notwithstanding the Roffe. former action was for want of declaring in due time superseded, Carth. 469. the cause of action remains.

Bro. Superf. Two sheep having been distrained, the owner applied for a writ Pl. 34. of *superfedeas*. It was hereupon said, that this writ lies only for the person, and not for any chattels: but by *Lacon* it lies for both.

Fitzh. N.B. A writ of *superfedeas* lies to process of outlawry. 237.

1 Hawk. If one justice of the peace have granted a warrant to compel a P. C. c. 66. person to find surety of the peace, any other justice may, upon the § 14. person's entering into a recognizance before him for keeping the Lamb. 95, peace, supersede the former warrant. 96. 99.

Fitzh. N.B. If a writ of *supplicavit* have issued from the court of Chancery, 238. to compel a man to find surety of the peace, he may, upon finding surety in that court, have a writ of *superfedeas*.

Ibid. Heretofore if a justice of the peace had granted a warrant, to Lamb. 96. compel a person to find surety of the peace, the court of Chancery or King's Bench might, upon the person's finding surety, have granted a writ of *superfedeas* to the warrant.

But by the 21 Jac. 1. c. 8. § 3. after reciting, that divers turbulent and contentious persons, deservedly fearing to be bound to the peace or good behaviour by justices of the peace of the counties where they dwell, do oftentimes procure themselves to be bound to the peace or good behaviour, in the court of Chancery or King's Bench upon insufficient sureties, or upon colourable prosecution of some person or persons, who will be ready at all times to release them at their own pleasure; whereupon his Majesty's writs of *superfedeas* are oftentimes directed to the justices of the peace, and others his Majesty's officers, requiring them and every of them to forbear to arrest or imprison the parties aforesaid; by means whereof the said turbulent and contentious persons misdeemean themselves amongst their neighbours with impunity, to the great offence and disturbance of their neighbours amongst whom they converse and live, to the affront of the justices of the peace, and to the evil example and encouragement of like ill-disposed persons, it is enacted, "That all writs of *superfedeas*, granted by either of the courts "aforesaid, shall be void and of none effect, unless such process "be granted upon motion in open court first made, and upon "such sufficient sureties, as shall appear unto the judge or judges "of the same court respectively upon oath, to be assessed at five "pounds lands or ten pounds in goods in the subsidy book at the "least; and unless it shall also appear unto the said judge or "judges, from whom such *superfedeas* is desired, that the process "of the peace or good behaviour is prosecuted against him or "them desiring such *superfedeas*, *bonâ fide*, and by some party "grieved, in that court out of which such *superfedeas* is desired "to be awarded."

If a person in a writ of right in a court-baron, or in any other court, vouch a foreigner to warranty, the tenant may sue forth a writ of *superfedeas* directed to the court, commanding them not to proceed till the warranty is determined. Fitzh. N.B. 239.

If a court Christian, after a writ of prohibition has been awarded, proceed to excommunication, and a writ *de excommunicato capi-endo* be awarded, a writ of *superfedeas* lies. Ibid.

It has been holden, that no writ of *superfedeas* shall be awarded by the court of King's Bench to a writ *de excommunicato capi-endo*, before the writ is returned; because the party, as the contrary cannot till then appear, may have been excommunicated for one of the causes mentioned in the 5 *Eliz. c. 23*. 1 Sid. 181. Anon.

But, if from the entry of a writ *de excommunicato capi-endo* in the court of King's Bench, it appear to have issued upon a sentence of excommunication for some cause not within the 5 *Eliz. c. 23*, the court may award a writ of *superfedeas* without waiting till it is returned; otherwise the party, who, if taken into custody, must at the return of the writ be discharged, may in the mean time be deprived of his liberty, upon a writ which ought not to have been awarded. 10 Mod. 351, 352. Rex v. Theed. Stra. 43.

It was in a modern case holden upon great consideration, that a writ of *superfedeas* ought not to be awarded to a writ *de excommunicato capi-endo*, which issued from the court of Chancery in England, upon a *significavit* from a court of delegates in Ireland, which sat under an authority derived from the court of Chancery in England. Sayer, 257. Rex v. Stephens.

If a plea of trespass *vi et armis* be holden in a sheriff's court, the defendant may have a writ of *superfedeas*, with a recital, that plea of trespass *vi et armis* shall not be holden in a less court than before the king himself, or other justices by his commandment. Fitzh. N.B. 239.

If a sheriff hold plea of forty shillings, a writ of *superfedeas* lies. Ibid.

If a man sue in the sheriff's court for an entire debt of more than forty shillings, by divers pleas each under the sum of forty shillings, the defendant may have a writ of *superfedeas*, commanding the sheriff not to hold plea of those pleas. Ibid.

If the constable of *Dover* hold plea of a thing which he ought not to hold plea of, a writ of *superfedeas* lies. Fitzh. N.B. 240.

If a person, who on the account of privilege ought only to be sued in a certain court, be sued in any other court, he may have a writ of *superfedeas*. Vaugh 155. Bushell's case.

But, where a peer, being in custody upon a bill of *Middlesex*, moved for a writ of *superfedeas*, upon a suggestion, that he ought not to have been arrested, the court directed him to plead his privilege; and said they could not upon motion take notice thereof. Sty. 177. Earl Rivers's case.

If a process or writ have issued erroneously, or improperly, a writ of *superfedeas* lies.

In an action upon the case for words spoken in *London*, the defendant justified for words spoken in the county of *Suffolk*. The plaintiff Lit. Rep. 314.

Harvey's case. Cro. Jac. 43. plaintiff replied *de injuria sua propria*, and sued out a *venire facias* for London. A writ of *superfedeas* was awarded; because the *venire facias* ought to have been for the county of Suffolk.

Jenk. Cent. 58. If a writ of *habere facias possessionem* have issued erroneously and been executed, a writ of *superfedeas* will lie to restore the possession.

Skin. 422. The case of Certiorari's. Bro. Superf. pl. 24. Dyer, 81. It is in the general true, that a writ of *superfedeas* does not lie where a writ of attain is brought; for a verdict having been found upon the oath *duodecim legalium et proborum hominum*, the law will not, upon so slight a ground as the bringing of a writ of attain, presume that it is a false verdict.

Fitzh. N.B. 237, 238. But if, after the defendant in an action of trespass *vi et armis* have brought a writ of attain, the plaintiff sue out an *elegit*, and a *capias* be awarded for the fine due to the king, the defendant may have a writ of *superfedeas* as to the *capias*, upon a suggestion, that since the bringing of the writ of attain the plaintiff has sued out an *elegit*.

2 Roll. Abr. 493. Morfion v. Parrie. Fitzh. N.B. 104. If an *audita querela* be brought, the plaintiff, if the *audita querela* be founded upon matter of record or writing, may have a writ of *superfedeas* to stay execution; but not if it be founded upon matter *in pais*.

Bro. Superf. pl. 24. Noy, 145. Cro. Eliz. 364. Salk. 92.

2 Roll. Abr. 493. Whidner v. Conyers. Salk. 92. If an *audita querela* be brought, after the party who brings it has been taken in execution, he may have a writ of *superfedeas* as to his body; but as he is only thereby discharged for a time, that he may the better prosecute the *audita querela*, in case he be not relieved upon the *audita querela*, he shall again be a prisoner in execution.

Bro. Superf. pl. 35. 2 Roll. Abr. 492. If the plaintiff in an *audita querela*, after having been nonsuited, bring a second *audita querela*, he shall not have a writ of *superfedeas*.

Heretofore, if a writ of error were brought, execution might in all cases be staid by a writ of *superfedeas*.

[For cases upon this act, *vide supra*, vol. 1. 333.] But by the 3 *Ja. 1. c. 8.* after reciting, that his Highness's subjects are now more commonly withholden from their just debts, and often in danger to lose the same, by means of writs of error, which are now more commonly sued than they have heretofore been, it is enacted, "That no execution shall be staid or delayed upon or by any writ of error, or *superfedeas* thereupon to be sued, for the reversing of any judgment, given or to be given in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only; or in any action or bill of debt for rent, or upon any contract; in any of the courts of record at *Westminster*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in the courts of great sessions in *Wales*, unless such person or persons, in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein

"such

“such judgment is or shall be given shall allow of, shall, before such stay made, or *superfedeas* be awarded, be bound, unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, all and singular the debts, damages, and costs adjudged, or to be adjudged, upon the former judgment, and all costs and damages to be awarded for the same delaying of execution.”

The defendant, an executrix, pleaded *plene administravit*, and there was judgment against her *de bonis testatoris*. Upon bringing a writ of error it was moved, that she should not have a writ of *superfedeas* to stay execution, unless bail were put in as is required by the 3 *Jac. 1. c. 8.* It was holden, that the statute does not intend that there should be bail where the judgment is against the party himself, or where it is general against executors: but where the judgment against executors is special, namely, that execution shall be of the goods of the testator, and damages only of their own goods, it is not reasonable, nor the intent of the statute, that the executor should be obliged to find sureties, to pay all the judgment may be affirmed for with his own goods; and *Coke, Ch. J.* said, it had been ruled according to this difference in the court of Common Pleas, when he was there.

Cro. Jac.  
350.  
Goldsmith  
v. Platt.

It has been holden, that no bail is necessary where a writ of error is brought upon a judgment in an action of debt upon a bond for payment of money upon a bottomree contract; for that such bond is not within the meaning of the statute.

Show. 14.  
Garret v.  
Dandy.  
Com. 322.

But it is in a later case laid down, that if the contingency mentioned in a bottomree bond have happened, it is in every respect a bond for the payment of money only, and that bail must be put in, in case a writ of error be brought upon a judgment in an action of debt upon the bond.

Stra. 476.  
Pitt v.  
Coney.

A bond was, with condition to pay money, and to do a collateral act. It was holden, notwithstanding the breach assigned was only the non-payment of the money, that the bond was not within the 3 *Jac. 1. c. 8.* and a writ of error brought upon a judgment in an action of debt upon the bond was allowed without bail.

Carth. 29.  
Gerrard v.  
Danby.

But where the condition of a bond was for the payment of 500 *l.* at a certain day, being the sum mentioned in certain indentures, it was holden, that there ought to be bail in a writ of error brought upon a judgment in an action of debt upon the bond; for that the material part of the condition is the payment of the money, the other words being only added to shew, that the bond and the indentures are both securities for the same sum of 500 *l.*

Stra. 959.  
Desbordes v.  
Horley.

By the 13 *Car. 2. st. 2. c. 2. § 9.* after reciting the 3 *Jac. 1. c. 8.* and that divers other cases within the same mischief are not thereby provided for, it is enacted, “That no execution shall be staid, in any of the courts therein mentioned, by any writ  
“ of

“ of error, or *superfedeas* thereupon, after any verdict, and judgment thereupon, in any action of debt, grounded upon the statute made in the second year of the reign of *Edward* the Sixth for not setting forth of tithes, nor in any action upon the case upon any promise for the payment of money, action *sur trover*, action of covenant, detinue, or trespass, unless such recognizance, and in such manner as by the said act is directed, shall be first acknowledged in the court where such judgment is given.”

By the 16 & 17 *Car. 2. c. 8. § 3.* it is enacted, “ That no execution shall be staid, in any of the courts mentioned in a statute made in the third year of the reign of *James* the First, by writ of error or *superfedeas* thereupon, after any verdict and judgment thereupon, in any action personal whatsoever, unless a recognizance, with condition as in the said statute is directed, shall be first acknowledged in the court where such judgment shall be given: and that, in a writ of error to be brought upon any judgment after a verdict in any writ of dower, or in any action *ejectione firmæ*, no execution shall be thereupon or thereby staid, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such writ of dower or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued in default of the plaintiff or plaintiffs therein, or that the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum or sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit had.”

But by § 5. it is provided, “ That this act, or any thing therein contained, shall not extend to any writ of error to be brought by any executor or administrator; nor unto any action popular, nor unto any other action, which is or hereafter shall be brought upon any penal law or statute, except actions of debt for not setting forth of tithes; nor to any indictment, presentment, inquisition, information, or appeal; any thing hereinbefore expressed to the contrary thereof notwithstanding.”

Bro. Superf. It is in the general true, that a writ of *superfedeas* cannot be had  
pl. 35. upon a second writ of error, after the plaintiff in error has been  
Bro. Err. nonsuited in a former writ of error in the same court, or such  
pl. 55. former writ of error has abated by the act of the party, or has  
Latch, 57. been quashed.  
1 Vent. 100.  
1 Mod. 285.  
Stra. 880. 1015

1 Vent. 100. But, if a person bring a writ of error in the Exchequer-cham-  
2 Roll. Abr. ber, as upon a judgment of the King's Bench, before judgment is  
492. signed, he may bring a second writ of error, and have a writ of  
Smith v. *superfedeas* thereupon; for the first writ of error being a nul-  
Bowles. lity, because brought too early, the second is to be considered as  
the first.



If a first writ of error abate by the act of God, or for want of form, or in any way not by the act of the party, a writ of *superfedeas* may be had upon a second. Latch. 57.  
Couch v.  
Haine 530.  
Err. pl. 55. pl. 145.

It was formerly holden, that if one writ of error in parliament had abated by a prorogation, and a second were brought in the next session, a writ of *superfedeas*, if a term had intervened, could not have been awarded upon the second writ of error; although the first did not abate by the act of the party. 1 Vent. 31.  
Wortley v.  
Holt.  
2 Lev. 93.

But an order was made, about the year 1674, by the House of Lords, that no cause therein depending shall be discontinued by a prorogation. 1 Vent. 266.  
Lor. Euse v.  
Turton.  
2 Lev. 93.

It has since the making of this order been insisted, that, although the cause is not discontinued by a prorogation, the writ of error does abate; and a motion was made in the court of Exchequer for leave to take out execution in such case. The motion was denied; and by the court—If the writ of error be abated by the prorogation, you may take out execution without applying to the court; if it be not, the court cannot give leave to do it. The business of the House of Lords, in their judicial capacity, goes over from session to session, as matters below do from term to term (a). Burb. 131.  
Wright v.  
Crove.  
Trin. 9 G. 1.  
[(a) Vide  
acc. supra,  
vol. 1. 133.]

Upon the reversal of a judgment upon a writ of error the defendant, who was in custody, obtained a writ of *superfedeas*: but before she could get it allowed, she was charged with a new declaration at the suit of the same plaintiff. Application was hereupon made to the court, and she was ordered to be discharged. Being arrested a second time for the same debt for which the first action had been brought, the court was moved, that she might, upon entering a common appearance, have a writ of *superfedeas*. *Wills*, Ch. J. and *Comyns*, J. were of opinion, that, as she had had the benefit of a writ of *superfedeas* in the first action, which was at an end by the reversal of the judgment, the plaintiff was now at liberty to proceed in a second action. *Denton*, J. and *Fortescue*, J. were of opinion, that she ought to be discharged upon entering a common appearance. The court being divided, no rule was made. Barnes, 497.  
Sherwin v.  
Bowes.

## (D) Of certain Writs which are Superfedeases by Implication.

### 1. A Writ of *Audita Querela*.

IT is in one case laid down, that if an *audita querela* be brought upon a statute merchant before execution, it is a *superfedeas* by implication. 2 Roll. Abr.  
493. pl. 4.

But it is in another case laid down, that an *audita querela* is never a *superfedeas* by implication. Salk. 92.  
Langton v.  
Grant.

## 2. A Writ of second Deliverance.

Latch, 72. The plaintiff in an action of replevin having been nonsuited, Anon. the defendant had judgment *de retorno habendo*, and a writ issued Goldsb. 185. to inquire of the damages. A writ of second deliverance being afterwards brought by the plaintiff, it was holden to be a *superfedeas* by implication, as to the return of the goods, but not as to the writ of inquiry.

3. A Writ of *Habeas Corpus ad faciendum & recipiendum*.

2 Roll. Abr. A writ of *habeas corpus ad faciendum & recipiendum* does so 493. supercede the power of the court to which it is directed, that Johnson v. Ellis. Cro. every proceeding after it is served and before a *procedendo* is Eliz. 916. awarded is void. Cro. Car. 261. Salk. 352. 1 Mod. 195.

Skin. 244. As the person of the defendant is by a writ of *habeas corpus* Dorington v. Edwin. *ad faciendum & recipiendum* removed out of the jurisdiction of the inferior court, new bail must be put in, and the plaintiff must declare *de novo*.

[*Vide supra*, Vol. 3. tit. *Habeas Corpus*, pag. 440, 441, &c.]

4. A Writ of *Certiorari*.

Salk. 148. A writ of *certiorari*, in which are these words *coram nobis terminari volumus et non alibi*, supercedes all proceedings subsequent to Crofs v. Smith. the delivery thereof, although the record intended to be certified Cro. Eliz. 915. be never certified. Cro. Car. 261. Salk. 148. 2 Hawk. c. 27. § 64.

1 Keb. 93. It has been holden, that a writ of *certiorari* is a *superfedeas* to Rex v. Spelman. the inferior court from the time it was sued out; in the same Moor, 73. manner as the suing out of a writ of *superfedeas* from the court wherein a record is, which is an appearance upon record, will avoid an outlawry pronounced after, although the writ of *superfedeas* were not delivered to the sheriff before the *quinto exactus*.

Cro. Eliz. 915. But it is laid down in other books, that a writ of *certiorari* is not Fitzwilliam's case. a *superfedeas*, until it is delivered to the court, or person to whom it is directed. Cro. Jac. 282. 6 Mod. 61.

Salk. 144. And it is in some books laid down, that if a *certiorari*, for removing an indictment before justices of peace, be not delivered Rex v. North. before a jury is sworn for the trial of the indictment, the justices 6 Mod. 61. may proceed.

2 Roll. 492. It is said, that a writ of *certiorari*, for removing a recognizance Anon. to appear at the next general assize, and in the mean time to be of good behaviour, is a *superfedeas* to the obligation of the recognizance.

But

But it is laid down in other books, that although the recognition be in such case removed by the *certiorari*, the defendant is bound to appear; and that in default of appearance it shall be forfeited.

1 Bulstr. 156. 2 Hawk. P. C. c. 27. § 65.

[*Vide supra*, Vol. 1. tit. *Certiorari* (D), pag. 563.]

### 5. A Writ of Error.

A writ of error is a *superfedeas* by implication.

534. Bishop of Ossory's case. Cro. Jac. Godb. 439.

If the record of a judgment be removed by a writ of error it is necessarily a *superfedeas*; for the record being removed it is impossible for the justices of the court, in which it was, to award execution.

Cro. Jac. 534. Bro. Exec. pl. 68. Bro. Superf. pl. 16, 17. Skin. 422.

And when the record of a judgment is not removed, it would be quite unreasonable that the law should suffer a writ of error to be brought, the consequence of which may be a reversal of the judgment, and suffer execution to be taken out upon the judgment, pending the writ of error.

Some of the parties' names having been omitted in a writ of error, execution was taken out upon the judgment; the plaintiff being advised, that the record of the judgment was not removed by this defective writ; but it was holden, that although the record was not thereby removed, the hands of the court were so tied up by the writ of error, that a writ of execution ought not to have issued. Such defect may be a reason to quash a writ of error: but a defective writ of error is, until it be quashed, a *superfedeas*.

1 Mod. 28. Hughes v. Underwood.

A plaintiff who has signed judgment in a real action may, if his entry were lawful without the judgment, enter notwithstanding a writ of error is brought: for he does not, in this case, enter by virtue of the judgment: and the writ of error shall not put him into a worse condition than he was before.

12 Mod. 398. Badger v. Floyd.

J. N. having obtained judgment against J. S., he sued out a writ of *capias ad satisfaciendum*, to which the return was *non est inventus*. Hereupon he sued out a *scire facias* against his bail, and upon the return thereunto sued out a second *scire facias*. Before the return to the second *scire facias* the defendant brought a writ of error: it was holden that the writ of error was not a *superfedeas* to the proceedings against the bail; because these are founded upon an original different from that upon which the judgment is founded.

2 Roll. Abr. 491. Lock v. Tillier.

And for the same reason, if J. N., after obtaining judgment against J. S., proceed to judgment upon a *scire facias* against his bail, and the bail bring a writ of error, this shall not supersede execution upon the judgment against J. S.

2 Roll. Abr. 491. C. pl. 5.

But, if a *scire facias* be brought to have execution upon a judgment, a writ of error brought upon the judgment will be a *superfedeas* to the proceedings upon the *scire facias*, because these are founded upon the same original as the judgment is.

2 Roll. Abr. 490. B. pl. 3.

Bro. Err.  
Pl. 170.  
2 Roll. Abr.  
49c. B. pl. 4.  
Dyer, 32.

Upon this distinction, between proceedings founded upon the same or different originals, it was formerly holden, that although a writ of execution cannot issue upon a judgment, pending a writ of error, an action of debt may be brought upon the judgment; because the action of debt is founded upon a different original.

But this doctrine was long ago questioned, and many attempts have been made to overthrow it.

Dyer 32.  
Anon.

It was once pleaded to an action of debt upon a judgment brought, pending a writ of error, that the record of the judgment was removed: but the opinion of the court was, that, notwithstanding the removal, the action lay.

Raym. 100.  
Adams v.  
Tomlinson.

It is in one case said, that if an action of debt upon a judgment be brought before a writ of error, the action lies: but that if the writ of error be brought first, the action does not lie.

Skin. 388.  
Grandvill v.  
Dighton.

In answer to this distinction the case of *Limbury v. Langham*, which is cited by *Dolben* in a case in *Skinner*, and mentioned in *Sir Thomas Raymond's Reports*, has been frequently relied upon; wherein it was holden by all the judges, that a writ of error, whether it be brought before or after an action of debt upon a judgment, is not a *superfedeas* to the action.

Carth. 1.  
Rogers v.  
Mayhoe,  
Trin.  
3 Jac. 2.

It was once pleaded in bar to an action of debt upon a judgment, that a writ of error was depending upon the judgment. This plea was, upon a demurrer, holden to be bad; but the opinion of the court of King's Bench was, that if the same matter had been pleaded in abatement, it would have been good.

Carth. 197.  
Aby v. Buxton,  
Trin.  
3 Jac. 2.

And in the same term a plea in abatement, wherein the same matter was pleaded, was holden by the court of King's Bench to be good.

Show. 146.  
Roitenhoffer  
v. Lenthall,  
Pasch.  
2 W. & M.

But another plea in abatement, wherein the same matter was pleaded, was shortly after holden to be bad; and it was laid down, that such matter pleaded in abatement is as insufficient as if it had been pleaded in bar, and that such plea in abatement had never, except in the case of *Aby v. Buxton*, been holden to be good.

Sid. 236.  
Adams v.  
Tomlinson,  
Hil.  
16 Car. 2.

At another time a distinction was taken, between an action of debt upon a judgment of the court of King's Bench, and one upon a judgment of the court of Common Pleas, or of any other court out of which the record of the judgment is removed by a writ of error; and it was holden, that a writ of error is not a *superfedeas* to an action of debt brought in the court of King's Bench upon a judgment of that court; because the record, as only a transcript thereof is sent upon bringing a writ of error into the court of Exchequer or the House of Lords, remains in that court: but a doubt was made, if such action would not lie in the court of Common Pleas, upon a judgment of that court.

This, which would be prejudicial to the court of Common Pleas, is not reconcileable with what is laid down in divers books.

7 H. 6. 31.  
Bro Exec.  
pl. 68.  
18 E. 4. 6. b.

As long ago as the seventh year of *Henry the Sixth* it was holden, that an action of debt would lie in the court of Common

Pleas upon a judgment of that court, notwithstanding a writ of error had been brought upon the judgment.

And it is laid down in divers cases, that a writ of error is only a *superfedeas* so far as to bind the hands of the court, that a writ of execution cannot be issued upon the judgment.

2 Roll. Abr.  
491. D.  
pl. 3.  
1 Lev. 153.  
12 Mod. 391.

Upon the strength of these authorities it was, not many years after the doubt made in the court of King's Bench, resolved by the court of Common Pleas, that, although the record of a judgment of the court of Common Pleas be removed by a writ of error, an action of debt will lie in that court upon the judgment pending the writ of error.

3 Lev. 397.  
Gale v. Hill.  
Pasch.  
6 W. & M.

At length courts of justice hit upon a method of preventing the effect of an action of debt brought upon a judgment pending a writ of error. This was, (and indeed there was no other way of doing it, without determining contrary to what had been holden in a number of cases,) by making a rule, that upon giving judgment in the action, execution shall be staid until the writ of error is determined.

The practice of making such rules seems to have been introduced at the latter end of the reign of *William the Third*, or early in the reign of *Queen Anne*: for in the fifth year of the reign of *William and Mary* it was holden by the court of King's Bench, that such action would lie; and no notice is taken of any method to render it ineffectual.

Skin. 388.  
Glanville v.  
Dighton.

In one case, which was in the fifth year of the reign of *Anne*, the law is said to be settled, that a writ of error is a *superfedeas* to all proceedings upon a judgment.

11 Mod. 78  
Anon.

But it appears from later cases, that unless application be made to the court to stay the proceedings, an action of debt upon a judgment may not only be proceeded in, pending a writ of error, but that execution may be taken out upon the judgment in such action.

1 Barn. 202.  
Humphreys  
v. Daniel.  
East. 9 G. 2.  
Ibid. 143.

If this be so, it could not in the fifth year of the reign of *Anne* have been settled, that a writ of error is a *superfedeas* to all proceedings upon a judgment: but it was probably about that time settled, that if an action of debt have been brought upon a judgment, after a writ of error has been brought upon the judgment, the court will, upon giving judgment in the action of debt, order execution in that action to be staid, until the writ of error is determined.

Clarkson v.  
Phyfic.  
Mich.  
13 G. 2.

Upon a rule to shew cause, why a writ of *feri facias* should not be set aside, and why the money levied thereupon should not be restored, it appeared, that a writ of error *coram vobis* had been brought and allowed; that the plaintiff's attorney had been served with a notice of the allowance before the writ of *feri facias* was sued out; that the writ of error was not determined; and that the writ of *feri facias* was sued out without leave of the court. The rule was made absolute; and by the court—A writ of error *coram vobis* is not a *superfedeas* in itself: but execution cannot be taken

Saver, 166.  
Ridout v.  
Wheeler.

out whilst it is depending, without leave of the court. It would be very unreasonable, that it should be in the power of a plaintiff to take out execution upon a judgment without leave of the court, whilst a question is depending concerning a fact, by which, in case the fact be as it is alleged, his right of action will be destroyed.

[See farther on this Division *supra*, Vol. 2. tit. *Error* (H), pag. 477.]

### (E) Of certain Requisites, which are necessary to the making of a Writ of Error a Superfedeas by Implication.

**I**T has, under the last head, been shewn, that a writ of error is in the general a *superfedeas* by implication: but it should be remembered, that it is not so, unless certain requisites have been complied with.

#### 1. It must be allowed.

*1 Mod. 28.* It has been holden, that a writ of error is a *superfedeas* from the time of its being sealed.  
*Hughes v. Underwood.*  
*1 Vent. 30.* *1 Keb. 12.*

*Salk. 321.* But the better opinion is, that a writ of error is not a *superfedeas* until it be allowed, except notice of its having been sued out be given to the defendant in error.  
*Perkins v. Woolaston.*  
*1 Vent. 255.* *6 Mod. 130.* *Poph. 132.* *8 Mod. 147.*  
*1 Mod. 112.*

*1 Mod. 112.* Notice to the defendant of a writ of error having been sued out is however only a temporary *superfedeas*: for if the writ be not allowed within four days after it is sued out, execution may be taken out.  
*Lampiere v. Mereday.*  
*1 Vent. 255.*  
*2 Keb. 129.*

*Salk. 321.* The allowance of a writ of error, although no notice is given of its having been sued out, makes it a *superfedeas*: but, although a writ of error be, from the time of the allowance, a *superfedeas*, an attorney, who takes out execution after the allowance, is not guilty of a contempt, unless he had notice of its having been sued out.  
*Perkins v. Woolaston.*  
*6 Mod. 130.*  
*2 Roll. Abr. 492.*  
*1 Vent. 30.*  
*Rep. of Pr. out.*  
*in C. B. 35. 39.* *Str. 632.* *1 Mod. 148.*

*Stra. 947.* Other writs of error, being writs of right, are allowed of course: but a writ of error *coram vobis* cannot be allowed, without leave of the court.  
*Horne v. Bushel.*  
*1 Vent. 207.*  
*Stra. 690.*

*Sayer, 166.* And the court will not give leave for the allowance of a writ of error *coram vobis*, unless there be an affidavit of some error in fact; by which, in case the fact be as it is alleged, the plaintiff's right of action will be destroyed.  
*Ridout v. Wheeler.*

[But, although it be true, that a writ of error is a *superfedeas* from the allowance; yet, as it is the practice to sue out the writ of

of error before judgment is signed, the courts have said, it shall not operate as an allowance, till the judgment is actually signed, and the party shall be allowed four days after the judgment signed to put in bail; for before the judgment no bail can justify. As to the service of the allowance, that is only material to bring the party into contempt, if he proceeds to sue out execution afterwards.]

279. Doe v. Bracebridge, *Ibid.*

2. Bail must be put in thereto.

If the chief justice, to whom a writ of error is directed, die before it is returned, the writ becomes ineffectual: but execution cannot be taken out without leave of the court.

Barnes, 201. Cramborne v. Quennel.

Upon a rule to shew cause why a *scire facias*, which had been sued out upon a judgment, should not be set aside, it appeared, that a writ of error was delivered to the clerk of the errors before the *scire facias* was sued out: but that bail was not put in at the time of suing it out. The rule was made absolute; and by the court—Upon the delivery of a writ of error to the clerk of the errors, it becomes a *superfedeas* to a *scire facias* upon a judgment; and continues to be so for the space of four days from the allowance of the writ; after which time, if the plaintiff in error neglect to put in bail, it ceases to be a *superfedeas*.

Sayer, 52. Spratt v. Frederick.

Execution having been taken out after special bail was put in to a writ of error, because notice was not given of bail being put in, a writ of *superfedeas* was granted; and by the court—The putting in of bail, if no exception be taken thereto, is sufficient to stay execution; for the giving of notice is not necessary, and is only done for the sake of making the party, who takes out execution after notice, liable to be proceeded against for the contempt.

1 Keb. 690. The Dean of St. Paul's v. Capel. 3 Lev. 312.

In an action against five defendants, damages of twenty pounds were found by a verdict against four of them, and five shillings against the other, who had suffered judgment to go by default. A writ of error was brought by the four, in the name of him against whom the judgment by default was; and as he was not obliged to put in bail, no bail was put in: the court gave leave to take out execution notwithstanding this writ of error.

Barnes, 202. Mason v. Simmonds.

A writ of error was brought in the court of King's Bench upon a judgment of the court of Common Pleas; and the judgment was affirmed. Upon bringing a writ of error afterwards in parliament it was insisted, that no new recognizance was required by the 3 *Jas. 1. c. 8.* but by the court. The first recognizance does not include the payment of costs to be assessed in the House of Lords; and therefore a new recognizance ought, within the meaning of that statute, to be entered into. It is not the business of this court to inquire whether bail were put in to the first writ of error; inasmuch as the want of bail does not prevent the proceeding upon a writ of error, for it only prevents its being a *superfedeas*.

Salk. 97. Tilly v. Richardson. 8 Mod. 80. Stra. 527.

[*Vide supra*, Vol. 1. tit. Error (B), pag. 338.]

## 3. It must be proceeded in without Delay.

Jenk. 93.  
pl. 80.  
2 Roll. Abr.  
491.

If there be too long a day between the teste and the return of a writ of error, or if the plaintiff in error do not remove the record before the return-day, execution may be taken out; it plainly appearing that the writ of error was brought for delay.

Sid. 44.  
Anon.  
Jenk. 93.  
pl. 80.

A motion was made in *Michaëlas* term, that the time of the return of a writ of error, brought upon a judgment of the court of King's Bench, which was made returnable in the court of Exchequer in *Hilary* term following, might be shortened; or that the court would award execution. As to the first point the court said, that, as the writ had issued from the court of Chancery, they had no power to make any alteration therein. As to the second point, the court said, that the law is open to all men; and if the return be as suggested, execution may be taken out: for, if a writ of error be sued out with too long a return, it is not a *superfedeas*.

1 Vent. 31.  
Wortly v.  
Helt.

It has been holden, that a writ of error returnable *ad proximum parlamentum* is not, by reason of the distance of the return, a *superfedeas*.

Com. 420.  
Farnes v.  
Otway.

A writ of error in parliament being made returnable the first day of a session, the House was moved, that if the plaintiff in error do not transcribe the record within eight days execution may be taken out. An order was made to shew cause; but it was afterwards discharged; for that, as by the order of the House, of the 13th day of *July* 1678, fourteen days after the beginning of the session in which a writ of error is returnable are given to transcribe the record, it is not reasonable that the defendant in error should take out execution within that time.

Bunb. 69.  
Froitt v.  
Dawes.

But, where a record was not transcribed within fourteen days after the beginning of a session, it was ordered, that the record should be transcribed and certified into parliament within eight days, or that the defendant in error should be at liberty to take out execution.

## (F) To what Time a Writ of Error relates as a Superfedeas.

1 Mod. 112.  
Anon.

**A**LTHOUGH the teste of a writ of error be before judgment, it is good, in case there be judgment before the return of the writ.

Barnes, 198.  
White v.  
Morgan.

A writ of error being returnable on the effoin-day of *Hilary* term, and judgment not being signed till three days after the effoin-day, the plaintiff, apprehending the record was not removed by the writ of error, took out execution. The execution was set aside with costs; and by the court—As every judgment relates to the effoin-day of the term of which it is entered; the record was well removed.

Barnes, 196.  
Warwick  
v. Figg.

Execution having been taken out upon a judgment signed in a *Trinity* vacation, notwithstanding the allowance of a writ of error returnable



returnable in the *Trinity* term, it was set aside with costs ; and by the court—The judgment, although signed in the vacation, related to the first day of the preceding term, and, consequently, as it was signed before the return of a writ of error, the writ of error was a *superfedeas*.

The plaintiff having obtained a verdict at an assize in a long vacation, the defendant brought a writ of error, which was allowed, and bail put in on the 24th day of *October* following. Upon the 27th day of *October* the plaintiff entered judgment generally, and took out execution, teste the first day of the then *Michaelmas* term, which was executed before notice was given of the writ of error. But restitution was awarded ; and by the court—By the putting in of bail to the writ of error the hands of the court were so tied up, that the execution, although no notice was given of the writ of error, is void. The judgment does indeed, the entry being general, relate to the first day of the *Michaelmas* term, namely, the 23d day of *October*, and the execution relates to the same day ; and, consequently, the date of both is antecedent to the allowance of the writ of error, which was upon the 24th day of *October* : but, as the judgment is founded upon a verdict in the vacation of *Trinity* term, it could not be entered till the *quarto die post* ; namely, until the 27th of *October*, before which day the writ of error was allowed.

3 Lev. 312.  
Smith v.  
Cave.  
Hob. 329.  
8 Mod. 143.

A plaintiff not having signed his judgment until the return-day of a writ of error was past, the question was, Whether the writ of error were a *superfedeas* ? It was holden, that it was not ; and by the court—The plaintiff may sign his judgment when he pleases ; and, as he did not in fact sign it till after the return-day of the writ of error, the writ did not attach upon the judgment.

Rep. of Pr.  
in C. B. 50.  
Harding v.  
Avery.  
Mich.  
2 G. 2.

In a subsequent case wherein the plaintiff, who had been called upon to do it, delayed the signing of judgment until the return-day of a writ of error was past, the court ordered him to pay the defendant his costs, and to sue out a new writ of error at his own expence. The reporter of this case cites the case of *Harding v. Avery*, and adds *quare tamen* ; for it does not appear, that the plaintiff has in this case in any manner misbehaved himself.

Rep. of Pr.  
in C. B. 71.  
Duffield v.  
Warden.  
East. 5 G. 2.

In another subsequent case, wherein the plaintiff's attorney, who had artfully delayed the signing of judgment until the return-day of a writ of error was past, then signed judgment, and brought an action of debt upon the judgment, a rule was made for staying proceedings in the action ; and that a new writ of error should be sued out at the attorney's expence.

Barnes, 250.  
Arden v.  
Lamley.  
East. 8 G. 2.

In a very modern case, the plaintiff's attorney, notwithstanding he had notice of the allowance of a writ of error, delayed the signing of judgment until the return-day of the writ of error was past, and then signed judgment, and took out execution. A rule was made for setting aside the execution, and that a new writ of error should be sued out at the attorney's expence ; and by Lord Mansfield, Ch. J.—In the case of *Arden v. Lamley*. (*supra*), a rule of the same kind, notwithstanding there are some old cases to the contrary, was made.

MS. Rep.  
Fisher v.  
Brandon.  
Hil. 5 G. 3;  
in C. B.

## (G) What the Effect of a Superfedeas is.

Cro. Jac.  
379.  
Withers v.  
Hensley.

UPON a demurrer to a declaration in an action of false imprisonment against a sheriff it was said, that as the defendant had arrested the plaintiff upon a *capias*, before a writ of *superfedeas* was delivered to him, he was not bound, the arrest being lawful, to discharge him, but may return the writ upon which he was arrested, together with the writ of *superfedeas*, for the court to do as they think proper: but it was holden unanimously, that the writ of *superfedeas* was as obligatory upon the sheriff to discharge the plaintiff, as the *capias* was to arrest him; and that as he did not obey it, he is liable to an action of false imprisonment.

1 Vent. 2.  
Anon.  
Fitzh. N. B.  
217.  
Jenk. 92.  
pl. 80.

If a *capias ad satisfaciendum* have issued upon a judgment, and the defendant be arrested upon it, the sheriff is not bound to discharge him, notwithstanding a writ of *superfedeas* be delivered to him, or he have notice of the allowance of a writ of error; because the defendant is in that case taken in execution.

Jenk. 92.  
pl. 80.

But, if the person, who is arrested upon a *capias ad satisfaciendum*, have a writ of *superfedeas* in his pocket, and deliver it to the sheriff immediately upon being arrested, he ought to be discharged.

Barnes, 368.  
Peachey v.  
Dowes.

After the reversal of a judgment, the defendant, who was in custody, sued out a writ of *superfedeas*: but before she could get the writ allowed, the plaintiff charged her with another declaration. She was, notwithstanding this declaration, ordered to be discharged; and by the court—As the defendant was in custody at the plaintiff's suit only, she could not regularly be charged with a second declaration after the reversal of the judgment, upon which she had been wrongfully detained.

1 Vent. 30.  
Cotton v.  
Daintry.  
Rep. of Pr.  
in C. B. 35.  
39.

If goods be taken in execution after the suing out a writ of *superfedeas*, or the allowance of a writ of error, the court, although the writ were not delivered to the sheriff, or although notice were not given to him of the allowance of the writ of error before the taking of the goods, will order restitution, or, in case the goods have been sold, will order the money to be brought into court.

2 Roll. Abr.  
491.  
Sarc v. Shel-  
ten.

It has been holden, that if before sale of goods, which have been seized under a *feri facias*, the defendant deliver a writ of *superfedeas* to the sheriff, he shall have the goods again; for that the property is not altered by the seizure.

2 Roll. Abr.  
492. D. pl. 6.  
Ibid. 493.  
H. pl. 2.  
Dyer, 98.  
Yelv. 6.  
1 Vent. 255.

But this case does not seem to be law; for it is laid down in other books, that if an execution be begun, it shall, notwithstanding the delivery of a writ of *superfedeas*, or the allowance of a writ of error, proceed.

Salk. 323. Ld. Raym. 990.

Cro. Eliz.  
597.  
Charter v.  
Peter.

A sheriff having seized goods under a *feri facias* upon a judgment of the court of King's Bench, the record, before the sale of the goods, was removed by a writ of error into the Exchequer-chamber, and a writ of *superfedeas* was awarded. Upon the return of

of the sheriff to the *fieri facias*, that he had seized the goods, and that they remained in his hands *pro defectu emptorum*, restitution was prayed. It was holden, that as the execution was begun before the writ of *superfedeas* was delivered to the sheriff, a writ of *venditioni exponas* should be awarded to perfect it; and that, although the plea-roll be removed by the writ of error, the writ of *venditioni exponas* may be awarded from the return to the *fieri facias*.

But, if a writ of execution have issued contrary to a rule of court, or upon a judgment entered irregularly, it may, notwithstanding it has been in part executed, be set aside, *quia improvidè emanavit*. Jenk. 93. pl. 80.

If a person, who has been taken in execution, and his lands extended upon a statute merchant, bring a writ of *audita querela*, he may have a writ of *superfedeas quoad* his person: but, as the writ of *superfedeas* is awarded, for the sake of giving him an opportunity of prosecuting the *audita querela*, he shall, in case he be not relieved upon the *audita querela*, be taken into custody again.

2 Roll. Abr. 493.  
Whidner v. Conyers.

Upon a rule to shew cause, why a judgment should not be set aside for irregularity, [and why the defendant should not be discharged out of custody, it appeared, that eight years before a writ of *superfedeas* had been awarded, for discharging the defendant out of custody, because he was not charged in execution in proper time after judgment had been signed against him; and that he was now in custody upon a *capias ad satisfaciendum*, which had issued upon a judgment in an action of debt upon the former judgment. The rule was made absolute; and by the court—It has been truly said, that, after a defendant has been discharged out of custody for want of being charged in execution in proper time, his person cannot be afterwards taken in execution upon the same judgment: but this does not apply to the present case; for the defendant has not been taken in execution upon the judgment in the former action, but upon a judgment in a different action.

MS. Rep. Baldwin v. Foot. East. 14 G. 3. in C. B. [Qu. If this case, which was added by the last editor, be not misstated, as to the judgment of the court, and whether, from the reasoning of the court, we should not read,

that the rule was *discharged*, instead of *made absolute*. And taking it so, it perfectly accords with the doctrine of a late case, that a *superfedeas* obtained after judgment, cannot be pleaded in bar to an action on that judgment, this being a new action. Topping v. Ryan, 1 Term Rep. 273. Besides the rule that a prisoner who is once *superfedeable*, always continues so, only holds so long as he remains in the same custody, and under the same process. Rose v. Christfield, 1 Term Rep. 591.]

## (H) How Disobedience to a Superfedeas may be punished.

**I**F a sheriff, or other officer, detain a person in custody, who has been arrested upon a *capias* or an exigent, after a writ of *superfedeas* delivered to him, an action of false imprisonment lies.

Cro. Jac. 379.  
Wythers v. Henley.

1 Roll. Rep. 241. 3 Bulstr. 97. Fitzh. N. B. 236.

But no action lies for detaining a person who has been arrested upon a *capias ad satisfaciendum*; because such person is taken in execution.

1 Ventr. 2. Anon. Fitzh. N. B. 237. Jenk. 92. pl. 80.

A judge

2 Hawk. c. 22. § 28. A judge of an inferior court is liable to be punished for a contempt, if he proceed in a cause after the delivery of a writ of *habeas corpus ad faciendum et recipiendum*, or after notice of the allowance of a writ of error.

Fitzh. N.B. 14. Fitzh. Replev. 31. A sheriff is liable to be punished for a contempt, if he proceed in a cause in his county court after the delivery of a writ of *superfedeas*.

Moor, 677. Justices of the peace, or commissioners of sewers, are liable to be punished for a contempt, if they proceed in a matter after the delivery of a writ of *certiorari*.

1 Mod. 44. Cro. Eliz. 915. 2 Hawk. c. 22. § 28.

1 Vent. 30. Cotton v. Daintry. Rep. of Pr. in C. B. 35. A sheriff, who has taken a person, or the goods of a person, in execution after the delivery of a writ of *superfedeas*, or after notice of the allowance of a writ of error, is liable to be punished for a contempt.

Barnes, 376. Hannot v. Farrettes. Rep. of Pr. in C. B. 35. If an attorney take out execution after notice of the allowance of a writ of error, he is liable to be punished for a contempt.

## Surety of the Peace.

**S**URETY of the peace is a recognizance entered into to the king for keeping the peace.

Under this title it will be proper to shew,

- (A) In what Cases a Justice of the Peace may, *ex officio*, compel a Person to find Security for keeping the Peace.
- (B) Who may crave Surety of the Peace.
- (C) Against whom Surety of the Peace may be granted.
- (D) In what Cases Surety of the Peace ought to be granted.
- (E) The Manner of granting Surety of the Peace by the Court of Chancery.
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(G) The

(G) The Manner of granting Surety of the Peace by a Justice of the Peace.

(H) In what Cases a Recognizance for keeping the Peace is forfeited.

(I) In what Cases a Recognizance for keeping the Peace may be discharged.

(A) In what Cases a Justice of the Peace may, *ex officio*, compel a Person to find Security for keeping the Peace.

A Justice of the peace may, at his discretion, bind all those to keep the peace, who in his presence shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words; and all those who shall go about with unusual weapons or attendants to the terror of the people; and all such persons as he shall know to be common barrators; and all who shall be brought before him by a constable for a breach of the peace in the presence of such constable; and all persons, who having been before bound to keep the peace, shall be convicted of having forfeited their recognizance.

Lamb. 77,  
78. Bro.  
Peace, pl. 7,  
8. 1 Hawk.  
c. 60. § 1.

(B) Who may crave Surety of the Peace.

ALL persons under the king's protection, being of *sane* memory, whether natural-born subjects or aliens, good subjects or attainted of treason or other crime, have a right to crave surety of the peace.

Lamb. 78,  
79, 80.  
1 Hawk.  
c. 60. § 2.

It has been questioned, whether Jews or Pagans, or persons attainted of *præmunire*, have a right to crave surety of the peace.

Lamb. 80.  
1 Hawk.  
c. 60. § 3.

A wife may crave surety of the peace against her husband, if he threaten to beat her outrageously, or to kill her.

Fitzh. N. B.  
80.

Lamb. 80.  
2 Lev. 128. 1 Hawk. c. 60. § 4.

A woman exhibited articles of the peace, in which she called herself the wife of the defendant, and set forth the pendency of a suit in the ecclesiastical court for the restitution of conjugal rights. When the defendant came to put in bail, he desired, that the recognizance might not be taken so as to carry with it an admission of a marriage: and the court ordered it to be in these terms: "To keep the peace towards our Sovereign Lord the King, and all his liege people, and particularly towards *Hannah Penn*, who hath exhibited articles of the peace against him the said *James Bambridge*, by the name of *Hannah Bambridge*, wife of him the said *James*."

Stra. 1231.  
Rex v.  
Bambridge.

Surety

Stra. 1207. Surety of the peace may be craved by a husband against his wife.  
 Sims's case.  
 1 Hawk. c. 60. § 4.

Pult. 18. It is said, that surety of the peace is usually granted at the request of one person, for that the fear of one person can scarce ever be the fear of another; and that if surety of the peace be granted against two or more persons, every one of them must enter into a separate recognizance.

MS. Rep. But in a modern case, the court of King's Bench allowed three women to file joint articles of the peace against three men.  
 Rex v. Nettle and two others. Mich. 23 G. 2.

### (C) Against whom Surety of the Peace may be granted.

Lamb. 82. SURETY of the peace may be granted against every person of sane memory, whether of full age or under age.  
 1 Hawk. c. 60. § 5.

1 Hawk. If surety of the peace be granted against an infant or feme covert, who cannot themselves be bound, a recognizance must be entered into by their friends.  
 c. 60. § 5.  
 Lamb. 81.

### (D) In what Cases Surety of the Peace ought to be granted.

Lamb. 82. IF one person have just cause to fear that another person will burn his house, or do him some corporal hurt; or that he will procure a third person to do him some corporal hurt, surety of the peace ought to be granted.  
 1 Hawk. c. 60. § 6.  
 Stra. 473.

Bro. Peace, It is said, that surety of the peace ought not to be granted for threatening to imprison; because damages may be recovered in an action of false imprisonment.  
 pl. 22.

Lamb. 83. But the better opinion is, that it ought to be granted in such case, because imprisonment is a corporal hurt. The reason given for its not being granted is no more conclusive in this case than in that of a battery: for an action will lie for a battery; and yet surety of the peace ought to be granted for threatening to beat.

Moor, 874. Surety of the peace ought to be granted against a husband, if he give his wife unreasonable correction.  
 Sir Thomas Seymour's case. Godb. 215. Fitzh. N. B. 80.

1 Keb. 290. Divers persons having made a disturbance in a church, and pulled the minister, who was reading the Common Prayer, out of the desk, the court of King's Bench gave leave to exhibit articles of the peace against them.  
 Rex v. Douglas.

Dalt. 266. If one person threaten to hurt the wife or child of another, surety of the peace ought to be granted.

Lamb. 83. But surety of the peace ought not to be granted, because one person threatens to hurt the servant or cattle of another.

Surety of the peace ought not to be granted on account of a past beating, unless there be fear of future danger: the remedy in such case being by action or indictment. Dalt. 266.

Surety of the peace ought to be craved soon after the cause of the fear on account of which it is craved; for the suffering of much time to pass before it is craved shews, that the party craving it has not been under great fear. 6 Mod. 132. The Queen v. Lane.

## (E) The Manner of granting Surety of the Peace by the Court of Chancery.

**A**T the common law it was sufficient, in order to obtain process for surety of the peace from the court of Chancery, for the party who craved it to make oath, that he was in fear of a corporal hurt; and that he did not crave surety of the peace from malice, but for the safety of his person. Fitzh. N. B. 79, 80.

But by the 21 *Jac. 1. c. 8.* after reciting, that divers turbulent and contentious persons, some out of malice, and others in hope of gain by way of composition, do oftentimes upon their corporal oaths, or otherwise upon false suggestions and surmises, procure process of the peace or good behaviour out of his Majesty's courts of Chancery and King's Bench against divers of his Majesty's quiet subjects, whose dwellings and abodes are for the most part in counties far distant and remote from the said courts, to their intolerable trouble and vexation; whereas they might, upon good cause shewed, receive justice at the hands of the justices of the peace in the counties where they dwell, it is enacted, "That all process of the peace or good behaviour, to be granted or awarded out of the said courts, or either of them, against any person or persons whatsoever, at the suit of, or by the prosecution of, any person or persons whatsoever, shall be void and of none effect, unless such process shall be granted or awarded upon motion first made before the judge or judges of the same courts respectively sitting in open court; and upon declaration in writing upon their corporal oaths, to be then exhibited by the parties which shall desire such process, of the causes for which such process shall be granted or awarded by or out of the said courts respectively, and unless such motion and declaration be mentioned to be made upon the back of the writ, the said writings there to be entered and remain of record: and if it shall afterwards appear to the said courts, or either of them respectively, that the cause, expressed in such writings, or any one of them, be untrue, then the judge or judges of the said courts, or either of them respectively, shall and may award such costs and damages unto the parties grieved, for their or any of their wrongful vexations in that behalf, as they shall think fit; and that the party or parties so offending shall be committed to prison by such judge or judges, until he or they shall pay the said costs and damages."

Fitzh. N.B.  
80.

If articles of the peace be exhibited in the court of Chancery, and oath be made, that the surety of the peace is not craved by the party from malice, but for the safety of his person, a writ of *supplicavit* issues, directed to the justices of the peace generally, or to some one justice of the peace, or to the sheriff, commanding them or him to take security in the sum thereon indorsed, and if the party refuse to find such security, to commit him to the next gaol until he do find such security.

Bro. Offic.  
pl. 39.  
Fitzh. N.B.  
81.

If a writ of *supplicavit* be directed to the sheriff, he may issue a precept to a bailiff to arrest the party: but only the sheriff himself can take a recognizance; for the power given by the writ being judicial, it cannot be delegated.

Bro. Peace,  
pl. 9.  
Lamb. 107.

If a writ of *supplicavit* be directed to the justices of the peace generally, only the justice of the peace to whom it is delivered can grant a warrant to compel the party to find security. The warrant must likewise be made returnable before the justice of the peace to whom it is delivered; for only he can take a recognizance or make a return to the writ.

1 Hawk.  
c. 60. § 15.  
Lamb. 101.

The recognizance to be entered into before the justice of the peace, to whom a writ of *supplicavit* is directed or delivered, must be in such sum as is indorsed upon the writ.

2 P. Wms.  
202.  
Clavering's  
case.

The sum, in which security is to be given upon a writ of *supplicavit*, is sometimes very large. A writ of *supplicavit* was once indorsed in the sum of 4000 *l*.

Fitzh. N.B.  
81.  
Lamb. 108,  
109.

If no return be made to a writ of *supplicavit*, the party who sued it out may have a writ of *certiorari*, directed to the person who ought to make a return, commanding him to certify the writ of *supplicavit*, together with what has been done thereupon.

Fitzh. N.B.  
81. 238.

If a writ of *supplicavit* have issued from the court of Chancery against a person, he may by himself or some friend come into the court, and give security there, that he will not do any harm to the person who sued out the writ; and thereupon he shall have a writ of *superfedeas*, reciting the writ of *supplicavit* and the security given, directed to the justices of the peace generally, or to some one justice of the peace, or to the sheriff, commanding them or him to surcease to arrest the person against whom the writ of *supplicavit* issued; or in case he have been arrested for that cause, and no other, to deliver him.

### (G) The Manner of granting Surety of the Peace by the Court of King's Bench.

Ante, page  
688.

AT the common law, the oath of the party was a sufficient ground for the court of King's Bench to grant surety of the peace; but this court cannot, since the statute made in the twenty-first year of the reign of King *James* the First, grant surety of the peace, unless articles of the peace are exhibited in open court.

*Mullineux,*



*Mullineux*, who had been taken into custody upon a writ of *supplicavit* out of the court of Chancery, being brought by a *habeas corpus* before *Jones*, justice of the King's Bench, he entered into a recognizance to appear in the court of King's Bench the first day of the next term. He appeared at the time; and the court was moved, that the articles exhibited in the court of Chancery might be read, and that he might enter into a recognizance for keeping the peace. No rule was made; and by the court—The record is not before us. If the witnesses, who swore to the articles in the court of Chancery, had been here, and had sworn to articles to the same effect, we could have taken a recognizance; but we cannot now do it.

Skin. 61.  
Mullineux's  
case.

If articles of the peace are exhibited in the court of King's Bench, and oath be made that the party does not crave the surety of the peace from hatred or malice, but for the safety of his person, an attachment of the peace issues, directed to the sheriff, commanding him to take a bond for the appearance of the party in the court of King's Bench, at the return of the attachment, to put in bail to the articles, and, if such bond be not given, to commit the party to the next gaol.

Comb. 427.  
Russe's  
case. Fitzh.  
N. B. 79.

It is a great hardship, that it should be in the power of one person to compel another, who lives in a very remote part of *England*, to appear and enter into a recognizance in the court of King's Bench, when he might have had the surety of the peace from a neighbouring justice; and it seems to have been the opinion of the court of King's Bench, some years ago, that a stop ought to be put to this vexation.

Upon a motion on the behalf of *Russel* to exhibit articles of the peace against seven or eight persons who lived at *Nottingham*, *Holt*, Ch. J. said, then we shall give seven or eight persons the trouble to come up to this court to put in bail, why did you not go to a justice of the peace in the county? The complainant answered, I could not have had justice there, they are relations. Hereupon the motion was granted, *sed hesitante*.

Comb. 427.  
Russe's  
case. Trin.  
9 W. 3.

In a late case, wherein the court of King's Bench was moved on the behalf of *Borough* for leave to exhibit articles of the peace against *Wait*, leave was unanimously refused; it appearing that *Wait* lived at the *Devizes*, and that *Borough* had not endeavoured to obtain the surety of the peace in the county wherein *Wait* lived; and by Lord *Mansfield*, Ch. J.—Apply to the magistrates of the county, and if surety of the peace be not granted, come here again.

MS. Rep.  
Borough's  
case. East.  
32 G. 2.  
[2 Burr.  
730. S. C.]

When the party, against whom articles of the peace are exhibited, comes into court to put in bail, the articles must be read to him.

6 Mod. 112.  
The Queen  
v. Lane.

Articles of the peace having been exhibited against Lord *Vane*, and process of the peace having issued, it was insisted, when he came to put in bail, that the facts charged in the articles were not a sufficient ground for granting surety of the peace; or if sufficient, that the facts were false, and affidavits were offered to disprove them. The reading of the affidavits was opposed, and it

Stra. 1202.  
Lord Vane's  
case.  
[2 Burr.  
306.]

was said, that the course of the court had always been, to give such credit to the oath of the party as to order security: but it was admitted, that the court might review the articles, and hear any objection arising upon the face of them; and by the court—'This is all we can do. The reading of affidavits to disprove the facts charged in the articles was never attempted before; and we must adhere to the course of the court, which is to take the articles to be true. Upon reviewing these articles, the court were of opinion, that the facts therein charged were a sufficient ground for granting surety of the peace.

MS. Rep.  
Rex v. Sir  
Thomas  
Allen, Bart.  
and others.  
Hil. 32 G. 2.  
[2 Burr.  
806. S. C.]

*Robert Parnel* exhibited articles of the peace against Sir *Thomas Allen*, Bart. and three others; and an attachment of the peace issued against them. Before a recognizance was entered into, *Parnel* presented a petition, in which he recited some of the facts sworn to in the articles, and endeavoured to explain them. Hereupon the counsel for the defendants moved for a rule to review the articles, and some affidavits were read to contradict the facts therein charged. Upon reading this petition and the affidavits, in which the facts were flatly contradicted by five or six persons, a rule was made to shew cause, why the articles should not be reviewed, and that *Parnel* should attend upon the day for shewing cause. He did attend, and the court was, upon the whole, so satisfied of his having been guilty of perjury, that he was immediately committed for wilful and corrupt perjury; and a rule was made that all farther proceedings upon the articles should stay. The rule was pronounced in these terms, and not to take the articles off the file, in order to give the defendants an opportunity of prosecuting *Parnel* for perjury, which could not otherwise have been done.

MS. Rep.  
Rex v. Ben-  
nett and  
others. East.  
32 G. 2.

Articles of the peace having been exhibited by *John Brown* against *Hannah Bennett* and three others, a rule was made, upon reading the affidavits of the defendants, to shew cause, why the articles should not be reviewed. It was sworn in the affidavits, that the defendants did not know such a person as *Brown* the articulant; and besides other strong facts sworn to, it was suggested, that the exhibiting of the articles was a fresh contrivance of the defendant *Bennett's* husband to oppress her. No cause being shewn, the articles were ordered to be taken off the file.

Str. 835.  
Rex v.  
Lewis.

Upon a motion for a *mandamus* to three justices of the peace in the county of *Brecon*, to take security upon articles of the peace exhibited in the court of King's Bench, an affidavit was produced, in which it was sworn that the defendant, who lived in that county, was seventy years of age, and so infirm as to be unable to travel; and *Seymour's* case, *M. 6 Ann.* was cited. A *mandamus* was awarded.

Sayer, 252.  
Rex v.  
Helliier.

Upon a rule to shew cause, why a *mandamus* should not be awarded to two justices of the peace in the country, to take a recognizance for keeping the peace, it appeared, that articles of the peace had been exhibited in the court of King's Bench; that the defendant was in prison; and that he was so poor, as not to be able to be at the expence of a *habeas corpus* for bringing him up to

to the court; the rule was discharged; and by the court—It has always been doubted, whether a recognizance for keeping the peace can be taken by justices of the peace, upon articles of the peace exhibited in this court. There has been only one instance, of late years, wherein a *mandamus* for taking such recognizance has been awarded; and in that case, which was the case of *Rex v. Lewis, Trin. 3 G. 2.* there were very particular circumstances; namely, that the defendant was seventy years of age, and that he was so infirm as not to be able to travel.

[Upon a woman's offering to exhibit articles of the peace against two persons, it appeared that the facts charged were done at *Portsmouth*. Upon which the court objected to her, that she ought to have applied to a justice of peace in the neighbourhood. It was answered, that if there should be any particular inconvenience arising therefrom, there might be a *mandamus* to a justice of peace in the county, empowering him to take the security there. The court, however, came to this expedient, *viz.* that on issuing the attachment of the peace, which is of course made out upon the court's receiving the articles praying security of the peace, an indorsement should be at the same time made thereon, authorizing and directing any justice or justices of the peace in the county of *Southampton* to take the security of the peace there; specifying the particular sums, wherein the principals and also their sureties should be bound.]

Margaret  
Hutt's case.  
2 Burr.  
1039.

If, after surety of the peace has been granted by the court of King's Bench, a writ of *superfedeas* come from the court of Chancery to the justices of the court of King's Bench, their power is at an end; and the party is, as to the recognizance, in this court discharged.

Bro. Peace,  
pl. 17.

## (G) The Manner of granting Surety of the Peace by a Justice of the Peace.

A Justice of the peace is empowered by the commission of the peace, "To cause to come before him all those, who to any one or more of our people concerning their bodies or the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards us and our people, and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept."

Lamb. 36.

If oath be made before a justice of the peace by one person, of his fearing that another person will burn his house, or do or procure to be done to him some corporal hurt, and that he does not crave the surety of the peace from malice, but for the safety of his person, the justice is bound to grant him the surety of the peace.

Lamb. 84.  
Fitzh. N.B.  
79. 1 Hawk.  
c. 60. § 6.

A justice of the peace may grant surety of the peace against a peer; but it is said to be the safer way, to apply to the court of Chancery, or the court of King's Bench.

1 Hawk.  
c. 60. § 5.  
Lamb. 81.  
[A peer or  
peeress cannot be bound over in any other place, than the courts of King's Bench or Chancery. 4 Bl.  
Comm. 253.]

Bro. Mainpr.  
pl. 39.  
1 Hawk.  
c. 60. § 9.

It is said, that, if the person against whom surety of the peace is craved be present, the justice of the peace may commit him immediately, unless he offer security for keeping the peace; and *a fortiori* that he may be required to find security, and be committed for not finding it.

MS. Rep.  
Wilkes's  
case. East.  
3 G. 3. in  
C. B.  
Lamb. 85.  
1 Hawk.  
c. 60. § 12.

But it was in a very late case laid down by *Pratt*, Ch. J. that no person ought to be committed by a justice of the peace, for not finding security for keeping the peace, until he has been required to find security, and has refused, or neglected, to do it.

If the person, against whom surety of the peace is craved, be absent, a warrant for committing him cannot be granted, until a warrant has been granted commanding him to find security for keeping the peace; and the warrant, which must be under seal, ought to shew the cause for which, and upon whose complaint it was granted.

5 Rep. 59.  
Foster's case.  
1 Hawk.  
c. 60. § 13.

The justice of the peace, who grants a warrant, commanding a person to find security for keeping the peace, may make the warrant special for bringing the person before himself only; for, as he has most knowledge of the matter, he is best qualified to do justice therein.

Bro. Falfe  
Impris.  
pl. 11.  
5 Rep. 59.  
1 Hawk.  
*ibid.*

If a warrant commanding a person to find security for keeping the peace be general, the officer who executes it has an election to carry the person before what justice he pleases, and may carry him to gaol under the same warrant, if he refuse to find security for keeping the peace before such justice; for the warrant has these words in it, *if he shall refuse to find security*.

Lamb. 95.  
96. 99.  
1 Hawk.  
c. 60. § 14.

If a person, who is under an apprehension that surety of the peace will be craved against him, give security for keeping the peace before a justice of the peace, either before or after a warrant is granted against him, he may have an order of *superfedeas* from the justice; and this shall prevent or discharge him from an arrest under the warrant of any other justice of the peace.

Fitzh. N.B.  
238.

A writ of *superfedeas* might heretofore have been had, as a thing of course, to a warrant of a justice of the peace, commanding a person to find security for keeping the peace. [But this is now varied by the 21 Jac. 1. c. 8. § 3. *quod vide supra*, tit. *Superfedeas* (C).]

Lamb. 100.  
1 Hawk.  
c. 60. § 15.

A recognizance for keeping the peace is to be regulated, as to the number and sufficiency of the sureties, the largeness of the sum it is to be taken in, and the time it is to continue in force, at the discretion of the justice of the peace by whom it is taken.

1 Hawk.  
*ibid.*  
Lamb. 100.

It is said, that a recognizance taken by a justice of the peace for keeping the peace as to *A. B.* for a year, or for the life of *A. B.*, without expressing any certain time, which shall be intended to be for the life of *A. B.*, although no time or place be fixed for the appearance of the recognizor, or he be not bound to keep the peace as to all the king's liege people, is good.

Lamb. 103.  
1 Hawk.  
c. 60. § 16.

But it is the safer way, to bind the recognizor to appear at the next sessions of the peace, and in the mean time to keep the peace as to all the king's liege people, and especially as to the party who craved the surety of the peace.

By the 3 H. 7. c. 1. it is enacted, " That every justice of the peace within this realm, that shall take any recognizance for keeping the peace, shall certify, send, or bring the recognizance at the next sessions of the peace where he is or hath been justice, that the party so bound may be called."

If one of the sureties in a recognizance for keeping the peace die, the recognizor is not obliged to find a new surety; the executors and administrators of the dead person being bound by the recognizance.

Lamb. 113.  
Pro. Peace,  
pl. 17.  
1 Hawk.  
c. 60. § 17.

## (H) In what Cases a Recognizance for keeping the the Peace is forfeited.

BY the 3 H. 7. c. 1. it is enacted, " That if the party, who is called at a session of the peace upon a recognizance for keeping the peace, make default, the default shall be there recorded, and the recognizance, with the record of the default, shall be sent and certified into the Chancery, or afore the king in his Bench, or into the king's Exchequer."

He who is bound to keep the peace, and to appear at a session of the peace, must appear and record his appearance, otherwise his recognizance is forfeited; and although the party who craved the surety of the peace come not, to pray that it may be continued, the justices may, at their discretion, order it to be continued till another session of the peace.

Bro. Peace,  
pl. 17.  
Lamb. 109.

But, if an excuse, which is by the court judged to be reasonable, be given for the non-appearance of the recognizor, the court is not bound to record his default, but may discharge the recognizance, or respite it till the next sessions of the peace.

1 Hawk.  
c. 60. § 18.

A recognizance for keeping the peace is forfeited by the doing of violence to any person, whether it be done by the party bound, or by any other, by his procurement.

Lamb. 115.  
127.  
Pro. Peace,  
c. 60. § 20.  
1 Hawk.

Upon a rule to shew cause, why the proceedings upon a *scire facias* should not be staid, it appeared, that the *scire facias* was brought upon a recognizance entered into by Stanley and his bail, for Stanley's keeping the peace as to all the king's subjects; that the recognizance was entered into in consequence of articles of peace exhibited by J. S. against Stanley; and that Stanley had been guilty of assaulting J. N. The rule was discharged; and by Rider, Ch. J.—If the peace have not been broken by an assault upon the person who exhibited articles of the peace, the court will not permit a proceeding by *scire facias* upon the recognizance entered into for keeping the peace, in case the proceeding appear clearly to be vexatious: but, if the recognizance be for keeping the peace as to all the king's subjects, as well as to the person who exhibited the articles, the court will not, in a doubtful case, stay the proceedings upon a *scire facias*; because the question, whether the breach of the peace, by assaulting another person, did amount to a forfeiture of the recognizance, may be determined upon the plea of not guilty to the *scire facias*.

Sayer, 139.  
Rex v.  
Stanley and  
his bail.

Lamb. 128. A recognizance for keeping the peace is not forfeited, where an  
 1 Hawk. officer, having a warrant to arrest a person, who will not suffer  
 c. 60. § 23. himself to be arrested, beats or wounds him in an attempt to arrest  
 him.

1 Sid. 176, If a parent, in a reasonable manner, chastise his child; a master  
 177. his servant; a schoolmaster his scholar; a gaoler his prisoner; or  
 Lamb. 127, a husband his wife, neither of these is a forfeiture of a recog-  
 123. Heil. nizance for keeping the peace.  
 141, 150.  
 1 Hawk. 15. Fitzh. N. B. 80.

And without enumerating all the assaults, which one person may make upon another, without forfeiting a recognizance for keeping the peace, it may, in the general, be said, that the recognizance is not forfeited by any assault, which could have been justified in an action, or upon an indictment for the assault.

Lamb. 115. A recognizance for keeping the peace is forfeited by treason  
 1 Hawk. against the person of the king, or by any unlawful assembling *in*  
 c. 60. § 21. *terrorem populi*.

Lamb. 115. It has been holden, that words which tend directly to a breach  
 1 Hawk. of the peace, as challenging a man to fight, or threatening to beat  
 ibid. Cro. a person who is present, amount to a forfeiture of a recognizance  
 Eliz. 86. for keeping the peace.

Lamb. 115. A recognizance for keeping the peace is forfeited by threaten-  
 ing to beat a person who is absent, if the person threatening after-  
 wards lie in wait to beat the person threatened.

Cro. Car. A recognizance for keeping the peace is not forfeited by words  
 498. Rex of heat, as calling a person knave, liar, or rascal: for although such  
 v. Heyward. words may provoke a hasty person to break the peace, they have  
 and his bail. not a direct tendency thereto; nor does it appear, that the speaker  
 1 Hawk. intended to carry his resentment any further.  
 c. 60. § 22.

Cro. Eliz. Nay, it has been holden, that a recognizance for being of good  
 86. King's behaviour is not forfeited by such words; and *a fortiori* a recog-  
 case. Mo. nizance for keeping the peace is not.  
 249.  
 1 Hawk. ib.

Cro. Jac. A recognizance for keeping the peace is not forfeited by a tres-  
 498. pass upon the lands or goods of any person, unless it be committed  
 1 Hawk. with actual force.  
 c. 60. § 25.

Dalt. 284. Nor is it forfeited by hurting a person in playing at cudgels or  
 1 Hawk. such like sport, by consent; inasmuch as such sports, which tend  
 c. 60. § 26. to promote activity and courage, are lawful.

Bro. Car. But a recognizance for keeping the peace is forfeited by wound-  
 229. ing a person in fighting with naked swords; because no consent  
 1 Hawk. can make so dangerous a thing lawful.  
 ibid.

1 Hawk. If a soldier hurt a person, by discharging his gun in exercising,  
 c. 60. § 27. without sufficient caution, it is not a forfeiture of a recognizance  
 Hob. 134. for keeping the peace; for although the soldier would be liable to  
 2 Roll. Abr. an action for the damage sustained, this is not such a wilful  
 548. breach of the peace, as is within the meaning of the recogni-  
 zance.

1 Hawk. A court of quarter session cannot proceed against a person for  
 c. 60. § 18. the forfeiture of a recognizance for keeping the peace: but the  
 recognizance

recognizance must be sent into one of the king's courts of record at *Westminster*.

Advantage of a forfeited recognizance must be taken by *seire facias*, and not by indictment. 1 Roll. Abr. 900. Perrow's case. Cro. Jac. 598. 1 Hawk. *ibid*.

## (I) In what Cases a Recognizance for keeping the Peace may be discharged.

**I**F the person who has entered into a recognizance for keeping the peace die, the recognizance may be discharged, if it were not forfeited before. Sav. 53. Halfhide's case.

If the person, who has craved the surety of the peace die, the recognizance may be discharged. 1 Lev. 236.

A release from the person upon whose complaint it was entered into, is not a discharge of a recognizance for keeping the peace; for, as the recognizance was entered into to the king, it is not in the power of that person to discharge it. Bro. Peace, pl. 17. Lamb. 112.

A recognizance being entered into by a husband, upon articles exhibited in the court of King's Bench by his wife to keep the peace for a year: a motion was made to discharge the recognizance, upon a suggestion that the wife consented thereto. No rule was made; and by *Holt*, Ch. J.—How can we discharge a recognizance before the condition thereof is performed. 11 Mod. 109. The Queen v. Lord George Howard.

A release however from the person, upon whose complaint a recognizance for keeping the peace was entered into, may, if no time for its continuance is mentioned in the recognizance, be an inducement to the court to discharge it. 1 Hawk. c. 60. § 17. 11 Mod. 109.

The demise of the king is a discharge of a recognizance for keeping the peace; for as the condition is *servare pacem nostram*, his successor cannot take advantage of a breach. Bro. Peace, pl. 15. 1 Hawk. *ibid*.

After the condition of a recognizance for keeping the peace is broken, the king may pardon the forfeiture: but the king cannot release the condition before it is broken; inasmuch as the person, upon whose complaint the recognizance was entered into, has an interest in the condition. Bro. Recogn. pl. 22. Bro. Chart de Pard. pl. 24. 1 Hawk. *ibid*. 2 Hawk. c. 57. § 34.

It has been holden, that if a recognizance for keeping the peace be removed by a writ of *certiorari*, the obligation to appear upon the recognizance is discharged. 2 Roll. Abr. 492. F. pl. 1. pl. 2. Dalt. 278.

But this would be highly inconvenient; and it seems to be the better opinion, that a writ of *certiorari* is no discharge of the obligation to appear upon a recognizance for keeping the peace. Cro. Jac. 282. Rolfe v. Pye. Yelv. 207. 2 Hawk. c. 27. § 65.

If no time for the continuance of a recognizance for keeping the peace be mentioned it is in the power of the court, by which the recognizance was taken, or to which it has been certified, to discharge it at their discretion.

The practice of courts of quarter session is, to continue a recognizance for keeping the peace from session to session, until it be discharged.

12 Mod.  
251.  
Anon.  
Stra. 835.

The practice of the court of King's Bench is, to continue the person bound to keep the peace upon his recognizance for twelve months; and if no indictment be within that time preferred against him, to discharge it at the expiration of that time.

2 P. Wms.  
202.  
Clavering's  
case.  
[See too *ex-  
parte* Sir  
Richard  
Grosvenor,

This seems likewise to be the practice of the court of Chancery; for upon a motion to discharge a writ of *supplicavit*, it was said by Lord *Macclesfield*, Chancellour—The application is too early; let the party stay until a year is expired, and, in the mean time, let him take care to behave himself peaceably.

3 P. Wms. 140. Baynum v. Baynum, Ambl. 63. *Ex parte* King, *Id.* 333.]

King v.  
King,  
2 Vez. 578.  
Ambl. 240.

[A motion was made on the part of the husband to discharge an order for a *supplicavit* on the part of the wife. It was made on affidavits; and the case was said to be more proper for the interposition of friends, than a court of justice. Lord *Hardwicke*—I think so too: but when it does come before a court of justice, the court must go according to its rules. I never knew a writ of *supplicavit*, or rules for surety of the peace in *B. R.* discharged, unless it has appeared to be a mere contrivance and falsity; and then in a particular instance, (or two, I believe,) I have known them discharged. The reason is, that they are for prevention: if, therefore, the parties conclude, they believe their lives to be in danger, the court will not try these facts upon affidavits on both sides. It must therefore be some strong case to shew, that it was a mere contrivance or falsity, that will be a ground to discharge a writ of *supplicavit* or rule of surety of the peace. But here the facts are not at all denied, and I am to take care of the person who swears her life is in danger. I cannot discharge this order.]

Vide 3 Burr.  
192.

## Surety of the good Behaviour.

**S**URETY of the good behaviour is a recognizance entered into to the king for being of good behaviour.

A recognizance for being of good behaviour in so many respects resembles a recognizance for keeping the peace, that the going into the particular consideration thereof would be little more than a repetition of what has been said under the title *Surety of the Peace*.

But as surety of the good behaviour may be granted in some cases where surety of the peace cannot; and as a recognizance for being of good behaviour may be more easily forfeited than a recognizance for keeping the peace, it will be proper to shew,

(A) In what Cases Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.

(B) What



(B) What is a Forfeiture of a Recognizance for being of good Behaviour, which would not have been so of a Recognizance for keeping the Peace.

(A) In what Cases Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.

BY the 34 E. 3. c. 1. justices of the peace are empowered "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize towards the king and his people."

It is laid down, that the words in the 34 E. 3. c. 1. *them that be not of good fame*, extend only to such persons as are justly suspected of having formed a design to break the peace.

This construction seems too narrow: for the words *them that be not of good fame* do, in the usual acceptation of them, as well extend to persons of a scandalous behaviour in other respects, as to those who give just cause of suspicion that they intend to break the peace.

A good deal is by the words *them that be not of good fame*, which are words of great latitude, left to the discretion of justices of the peace: but it is laid down, that they have power to demand surety of the good behaviour of those who sleep in the day and go abroad in the night; of such as keep suspicious company; of such as are generally suspected of being robbers; of evesdroppers; of common drunkards; and of all others, whose misbehaviour may be reasonably intended to bring them within the meaning of the statute.

The author of an obscene book is liable to be bound to be of good behaviour, as a person not of good fame.

Surety of the good behaviour may be demanded of a person who haunts bawdy-houses; and of a person who keeps women of bad fame in his house; and of all lewd persons.

If a person, who has no visible means to enable him so to do, live at an extravagant rate, he may be compelled to find surety of the good behaviour.

If a person have been guilty of exciting the people to disobedience to the law, he may be compelled to find surety of the good behaviour.

If one person lie in wait to hinder another from coming to a court of justice, surety of the good behaviour may be demanded of him.

If J. S. offer a woman money to buy medicines, to destroy a child of which she is pregnant, he may be compelled to find surety of the good behaviour.

Surety of the good behaviour is by divers statutes directed to be taken of the offenders against those statutes: as by the 1 M. 2. c. 3. of persons who have been guilty of disturbing any licensed preacher.

4 Inst. 181.  
2 H. 7. 2. B.  
3. A.

Lamb. 115,  
116, 117.  
1 Hawk.  
c. 61. § 2.

Lamb. 117.  
2 Roll. Rep.  
199, 227.  
Palm. 126.  
1 Hawk.  
*ibid.*

1 Hawk.  
c. 73. § 9.

Lamb. 119.  
12 Mod. 566.  
Crompt.  
c. 61. § 2.

12 Mod. 566.  
Claxton's  
case.

2 Vent. 22,  
23, 24.  
Rudyard's  
case.

2 Lill. Pr.  
Reg. 649.

Cro. Eliz.  
449.  
Cockain v.  
Witman.

By the 5 *Eliz. c. 21.* of persons who have been guilty of unlawful fishing or hunting.

By the 23 *Eliz. c. 1.* of persons who neglect to come to church for the space of one month.

By the 1 *Jac. 1. c. 13.* of persons who have been guilty of unlawful hunting, or of stealing deer or conies.

A justice of the peace cannot however compel a person to find surety of the good behaviour upon a general information.

*Styles, 16. Broker's case.*  
*Cro. Car. 469. Rex v. Heyw.*  
Surety of the good behaviour may be granted for words, which tend to disturb or deter an inferior officer of justice, as a constable, in the execution of his office.

2 *Roll. Rep. 228. Palm. 127. 1 Vent. 16. 1 Hawk. c. 61. § 3.*

*Cro. Eliz. 78. Simons v. Sweet. 1 Hawk. ibid. 1 Lev. 52, 53.*  
It may likewise be granted for words of contempt spoken to an inferior magistrate, as a justice of the peace or a mayor, although he be not in the actual execution of his office.

2 *Roll. Rep. 227. Palm. 130. Cro. Eliz. 86. 1 Hawk. ibid.*  
But it ought not to be granted for calling a person rascal, knave, liar, or drunkard; these being only words of heat.

2 *Lev. 107. Collins v. Man. 7 Mod. 29.*  
If one man call another liar in *Westminster-hall*, or before any great concourse of people, he is liable to be bound to be of good behaviour.

2 *Vent. 345. Smithson's case.*  
A woman may demand surety of the good behaviour against her husband, if he be guilty of ill usage to her.

If a person have been convicted of a misdemeanor, it is usually part of the judgment, that he shall find security for his good behaviour for some time.

## (B) What is a Forfeiture of a Recognizance for being of good Behaviour, which would not have been so of a Recognizance for keeping the Peace.

*Palm. 129. Stamp v. Hyde.*  
It is laid down, that the doing of a thing, for which the doer might be compelled to find surety of the good behaviour, is a forfeiture of a recognizance for being of good behaviour.

*Cro. Car. 419. Rex v. Heyward. 1 Hawk. c. 61. § 5.*  
But this is denied to be law; and it seems to be very unreasonable. The good of the publick may make it proper in some cases, to compel a suspected person to enter into a recognizance for being of good behaviour: but it would be extremely hard, that the recognizance should be forfeited, before he has been guilty of misbehaviour.

*Palm. 129. Stamp v. Hyde.*  
A recognizance for being of good behaviour is forfeited by the speaking of seditious words.

*Cro. Car. 429. 1 Hawk. c. 61. § 6.*

2 *Roll. Rep. 199. Stamp v. Hyde.*  
A recognizance for keeping the peace is not forfeited by threatening words, unless the party threatened be present: but a recognizance for being of good behaviour is forfeited by such words,

words, although the party concerning whom they were spoken be not present.

A recognizance for being of good behaviour is not, in the general, forfeited by words of heat, as calling a person knave, rascal, liar, or drunkard.

Cro. Eliz.  
86.  
King's case,  
Mo. 249.

But, if words of heat are spoken to a justice of the peace in the execution of his office, this is such misbehaviour as amounts to a forfeiture of a recognizance for being of good behaviour; for the publick good requires that magistrates should be treated with respect.

2 Roll. Rep.  
150. 228.  
Palm. 130.

A recognizance for being of good behaviour is forfeited by the recognizor's having a number of armed attendants, although he have not been guilty of a breach of the peace.

Lamb. 116.  
2 H. 7. 2 b.

If a person, who is under a recognizance for being of good behaviour, is arrested upon suspicion of felony, and afterwards escape, it is a forfeiture of the recognizance; and by the court—Although the arrest was tortious, no felony having been committed, the recognizance is forfeited by the escape, which is a misbehaviour; it being the duty of every person to stand to the law, and answer to every thing he is charged with.

2 Leon. 166.  
Crabbe's case.  
Godb. 622.

When a recognizance for being of good behaviour is pursuant to the direction of a statute entered into by a person, who has done something prohibited by the statute, the being afterwards guilty of another offence against the statute is a forfeiture of the recognizance.

Lamb. 118.

In a *scire facias* upon a recognizance for being of good behaviour, the breach assigned was, that the recognizor had assaulted and beat J. S., but it not being charged that the assault and beating were *vi et armis*, judgment was arrested.

Cro. Jac.  
412.  
Rex v.  
Hutchins.

## Tender and bringing Money into Court upon the common Rule.

**A** Tender is an offer to pay a debt, or to perform a duty. Bringing money into court is depositing money in court, for the satisfaction of a debt or duty.

Wherever a tender of money is pleaded, and the debt is not discharged by the tender and a refusal, money may be brought into court without leave of the court: nay, the money tendered must, as hereafter will be shewn, in such case be brought into court.

In all other cases leave of the court must be had, before money can be brought into court.

The

The rule, under which leave to bring money into court is granted, is, in some cases, as in the case of an ejectment by a mortgagee, founded upon a particular act of parliament.

This rule is, in other cases, founded upon the discretionary power of the court.

By the latter rule it is sometimes ordered, that, upon bringing money into court, the proceedings in the action shall be staid.

At other times it is ordered, that the money brought into court shall be stricken out of the declaration; and that the plaintiff shall not, at the trial of the issue, be permitted to give evidence for the said money.

The rule by which the money brought into court is ordered to be stricken out of a declaration, is, from its being more frequently granted, than that by which it is ordered, that the proceedings in the action shall be staid, called the common rule.

As the common rule, which was introduced to supply the defect of having made a tender, is the only one which is connected with a tender, it is not intended to treat professedly, under this title, of any other rule for bringing money into court.

By reason of the connexion, between making a tender and bringing money into court upon the common rule, it has been thought proper to treat of these two things under the same title: yet the design is, that each shall, as far as it can conveniently be done, have a distinct consideration.

Under this title it will be proper to shew,

(A) By whom a Tender may be made.

(B) What is a good Tender.

1. As to the Manner of tendering.

2. As to the Thing tendered.

(C) At what Place a Tender must be made.

(D) At what Time a Tender must be made.

(E) To whom a Tender must be made.

(F) The Consequences of a Tender and Refusal.

(G) The Consequences of being ready to tender, when the Party, to whom it was intended to have been made, was not present.

(H) Of pleading a Tender.

1. In the general.

2. Where *Uncore prist* is pleaded.

3. Where *Uncore prist* together with *Tout temps prist* is pleaded.

4. Where a *Profert in Curia* is pleaded.

(I) The

- (I) The Consequences of a *Profert in Curia*.
- (K) Of bringing Money into Court upon the common Rule.
- (L) At what Time Money may be brought into Court upon the common Rule.
- (M) Of pleading where Money has been brought into Court upon the common Rule.
- (N) The Consequences of bringing Money into Court upon the common Rule.
- (O) In what Cases a Tender may, in the general, be made, or Money may be brought into Court upon the common Rule.
- (P) Of tendering or bringing Money into Court upon the common Rule, in particular Actions.

1. In an Action of *Assumpsit*.
2. In an Action upon the Case.
3. In an Action of Covenant.
4. In an Action of Debt.
5. In an Action of Ejectment.
6. In an Action against a Justice of the Peace on the Account of something done in the Execution of his Office.
7. In an Action of Replevin.
8. In an Action of Trespafs.
9. In an Action of Trover.

(A) By whom a Tender may be made.

WHEREVER the right of tendering is personal, the tender must be made by the party himself. 7 Rep. 13.  
1 Inst. 208.

A tenant who is liable to a writ of *cessavit* must, if he would prevent the lord from recovering the land, personally tender the rent which is in arrear. Bro. Tend.  
pl. 29.  
Term de  
Ley, 102.

If a feoffment be made, with condition, that *if the feoffor pay a sum of money to the feoffee*, it shall be lawful for the feoffor and his heirs to enter, and the feoffor die before the money is paid, no tender can be made by his heir; for the right of tendering is in this case as much personal, as if the words had been, *if the feoffor during his life pay the money*. 1 Inst. 208.

But a tender made by a servant, or by a stranger, on the behalf and at the desire of a party, is as good, notwithstanding the right of tendering be personal, as if it had been made by the party himself. Cro. Eliz.  
43. Cro. v.  
Hambleton.

Wherever

Latch, 107.  
7 Rep. 13.  
1 Inst. 206,  
207, 208.

Wherever the right of tendering is not personal, a tender may be made by any person, who is a privy to the party in whom the right of tendering is.

1 Inst. 206.  
208, 209.  
4 Rep. 123.

If a feoffment be made, with condition, that if the feoffor pay a sum of money to the feoffee on a day certain, it shall be lawful for the feoffor and his heirs to enter, and the feoffor die before the day, a tender may be made at the day, either by the heir of the feoffor as a privy in blood, or by his executor as a privy in representation; the right of tendering not being in this case personal.

10 Mod.  
419. 424.  
425.  
Marks v.  
Marks.

A testator, after deviling land to his wife for life, devised the remainder to *Daniel* his second son in fee; provided, nevertheless, that if *Nathaniel* his third son should, within three months after the death of the testator's wife, pay the sum of five hundred pounds to *Daniel*, his executors or administrators, that *Nathaniel* and his heirs should have the land. As *Nathaniel*, who survived the testator, died during the life of the testator's wife, a question arose, Whether the heir of *Nathaniel* should, on the payment or tender of the money within the time limited, be entitled to the land? The opinion of *Parker*, Chancellour, and *Jekyll*, Master of the Rolls, who both considered it as a mere legal question, was, that the right of paying, or tendering the money, was not, in this case, personal, and consequently that it descended upon the heir of *Nathaniel*.

1 Inst. 206,  
207.

Wherever a grant is made of an estate, with condition to be void, upon tendering a certain thing therein mentioned by the grantor, a tender, if the right of making it be not personal, may be made by any person who becomes interested in the condition, although he be not a privy to the grantor.

7 Rep. 12,  
13.  
Englefield's  
case.

Sir *Francis Englefield* by indenture covenanted to stand seised of the manor of *Englefield*, to the use of himself for life, remainder to the use of *Francis Englefield* his nephew and the heirs of his body, remainder to the use of the right heirs of his said nephew, who at the time of making the deed was an infant. In the indenture it was afterwards said, that the covenant in favour of the nephew was not intended to be absolute during the life of Sir *Francis*; and, with a view that the uncle might, if, as the nephew grew up, he should prove extravagant, or be addicted to any enormous vice, have a check upon him, it was provided, that if the uncle should, by himself, or by any other person, during his natural life, tender to the nephew a ring of gold, with an intent to make the use of the indenture void as to the nephew, that then the said use should be void. Sir *Francis* being afterwards attainted of high treason by act of parliament, and the manor being thereby forfeited to Queen *Elizabeth*, she authorized two persons to tender a ring of gold to the nephew, with an intent to make the use of the indenture void as to the nephew. Upon this a question arose, Whether the use was by this tender made void? It was insisted on the behalf of the nephew, that as the substance of the condition, under which the said use might be made void, was to give Sir *Francis* an opportunity of declaring his intention,

and the tender of the ring was only an outward ceremony for declaring such intention, the right of tendering the ring was so annexed to his person, that it could not be transferred; that as the indenture was founded in natural love and affection, the uncle would, which no stranger could do, have exercised these in judging of the disposition of his nephew. It was moreover said, that by the common law, the guardianship of an eldest son is so annexed to his father's person, that it can neither be transferred nor forfeited. But the whole court were of opinion, that the recital of the cause, which might induce the uncle to reserve the power of tendering to himself, was only flourish or preamble, and not parcel of the condition, which consisted solely in the tender of the ring, and that this might be tendered, under the express words of the condition, by any other person as well as Sir *Francis*; and consequently, that the right of tendering, it not being personal, was now devolved upon the crown.

It is in the general true, that a tender cannot be made by one who has no interest in the condition, upon which the right of tendering is founded. 1 Inst. 207.

If the money, due upon a mortgage of an infant's estate, be tendered by a person who is neither guardian to the infant, nor has any interest in the estate, the tender is void. Cro. Eliz. 132. *Watkins v. Ashwicke.*

But any person may make a tender on the behalf of an idiot; for the law, by reason of his utter inability to act for himself, allows this to be done out of charity. 1 Inst. 206.

## (B) What is a good Tender.

### 1. As to the Manner of tendering.

**A** Tender is not good, unless the person making it declare upon what account it is made. Latch, 70. *Warner v. Harding.*

It is not enough for the person, who intends to make a tender, to say, I am ready to pay the debt, or to perform the duty; but he must make an actual offer to pay the one, or to perform the other. 1 Leon. 714. 2 Lev. 209. 3 Lev. 104. 12 Mod. 353. [However, the actual production of the money may be dispensed with by the conduct of the other party. 3 Term Rep. 683.]

The mortgagor said to the mortgagee, I am here ready to pay you the money due upon the mortgage; but at the same time kept the money, which was in a bag under his arm. This was holden not to be a good tender. Noy, 74. *Suckling v. Coney.*

But an actual offer of money in a bag is a good tender, provided it be proved, that the sum intended to be tendered was in the bag: for it is usual to carry money in a bag; and it is the duty of the party who receives it to tell it, and to examine whether it be good. 5 Rep. 115. *Wade's case.* 1 Inst. 208. [Vide 5 Term Rep. 432.]

*A.* contracted to pay *B.* ten thousand pounds, upon his transferring to *A.* or his order one thousand pounds *South-Sea* stock, at or before a certain time. *B.* before the time, made an actual transfer Str. 777. *Duke of Rutland v. Hodgson.*

transfer of the stock: but because *A.* did not come or send a person to accept the stock, and pay for it, the transfer was afterwards vacated.

The transfer of the stock seems in this case to have been made *ex abundanti cantela*: for it has been holden, that an actual transfer is not necessary to the making of a tender of stock good.

Ld. Raym.  
686.  
Lancashire  
v. Killing-  
worth,  
12 Mod.  
530.

In an action of covenant the plaintiff declared, that the defendant had agreed to pay him two thousand pounds, upon his transferring to the defendant one thousand pounds *Hudson's Bay* stock; and the plaintiff averred, that he offered to transfer the stock. It was holden, that this, although there was not an actual transfer of the stock, was a tender sufficient to entitle the plaintiff to the money.

Clark v.  
Tyson,  
1 Str. 504.

[Upon an issue, whether stock were tendered at the day, the plaintiff proved, that though the books were not opened to make transfers in the common form, yet they were ready at the office, and upon leave from a director, there might have been a transfer, it not being usual to deny it on such occasions; but the defendant, not attending to accept the stock, the plaintiff contented himself with staying there all day, and did not actually get leave from a director to have the books opened, if the defendant should come. And for this omission Lord Chief Justice *Pratt* ruled it not to be a sufficient tender, for there was a possibility that leave might not be given, and the plaintiff had not done every thing in his power: he ought to have so prepared matters, that if the defendant had appeared, there might have been a transfer immediately.]

Thornton v.  
Moulton,  
Id. 533.

At the opening of the books, the two brokers met, and the selling broker told the other, he was ready to transfer; the other alleged, it was usual to indulge the buyer for two or three days, and that he would find his principal in that time, which the other not disagreeing to, nothing further was done. And for want of having the buyer called at the books, the first day of the opening, the Lord Chief Justice *Pratt* ruled it not a good tender, and the plaintiff was nonsuited.

Bullock v.  
Noke,  
Id. 579.

In a stock-cause the plaintiff proved a tender on the second day of the opening, and would have examined into the custom of the Alley, which was, to allow either party a day or two to tender or accept; but the Chief Justice *Pratt* refused to admit such evidence, saying, their usage could never alter the law, and so the plaintiff was called. *N. B.* In *C. B.* Chief Justice *King* left it to the jury upon such an evidence; and they found it a good tender.]

## 2. As to the Thing tendered.

Bra. Tend.  
Pl. 39.  
2 Lill. P. R.  
688.

It was heretofore holden, that if a tender of rent in arrear is intended to be made, the whole rent, without deducting the land-tax, must be tendered.

30 G. 2.  
1. 3. § 15,  
16.  
[Vide Sapf-

But in every land-tax act, made for some years past, there is this clause, "The several and respective tenant and tenants of houses, lands, tenements, and hereditaments in *England, Wales, or Berwick*



“ *Bertwick upon Tweed*, which shall be rated by virtue of this act, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such houses, lands, tenements, and hereditaments, and to deduct out of the rents so much of the said rate, as in respect of the said rents of any such houses, lands, tenements, and hereditaments, the landlord should and ought to bear; and the said landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments, upon receipt of the residue of the said rents.”

ford v. Fletcher,  
4 Term Rep.  
511. *supra*,  
82.]

If *A.* be indebted to *B.* in divers distinct sums of money, he may make a tender of any one of the sums.

Bro. Tend.  
pl. 39.

A tender of more money than is due is good for what is due: for *omne majus continet in se minus*; and it is at the peril of the person, to whom the tender is made, if he take more than is due.

5 Rep. 115.  
Wade's case.  
Str. 916.  
[So it is

good, though the money tendered be mixed with other monies. 3 Term Rep. 683.]

If the condition of a bond be, that the obligor shall at a day and place certain pay twenty pounds or deliver ten kine, at the then choice of the obligee, a tender must be both of the money and the kine.

1 Leon. 68.  
Fordley's case.

A tender in any money coined at the mint, upon which there is the king's stamp, is good; for all such money is current, in proportion to its value, without a proclamation.

Comb. 387.  
Dixon v. Willoughs.  
1 Inst. 207. Salk. 446.

If a contract be to pay a hundred pounds in a foreign coin, a tender to the amount of this sum in any current coin of this kingdom is good.

Lat. 84.  
Ward v. Bidgwin.

If money be made current by proclamation at a higher rate than its intrinsic value, a tender in such money, according to its current value, is good.

Queen *Elizabeth* caused some mixed money to be coined at the mint, and sent it to *Ireland*, with a proclamation to be current there at a certain value; and by the same proclamation a stop was put to the currency of all other coins in that kingdom. It was held, that a tender made in this money, according to its current value, was good.

Dav. 18.  
The case of mixed money.

If the money, which has been tendered, become after a refusal to accept thereof current at a less value, than it was current at when the tender was made, the party who refused to accept the money must bear the loss.

In an action of debt for rent, the defendant pleaded a tender of the rent in pieces of *English* money called Shillings, every one of which was, at the time of the tender, current at the value of twelve pence, and that he is yet ready to pay the rent in the said pieces at that value. The plaintiff demurred, and for cause alleged, that before the bringing of the action, the said pieces of money were by proclamation made current only at the value of six-pence: but he afterwards thought proper to accept the money according to the value when the tender was made.

Dyer, 81.  
Barrington v. Potter.  
Dav. 27.

5 Rep. 114. If a foreign coin be made current in this kingdom by proclamation, a tender in such money is good; for it thereby becomes lawful money of this kingdom.

1 Inst. 208. If the money tendered has been accepted, the acceptor has no remedy, although some of it be counterfeit or deficient in value, or although there be not so much as it was tendered for: because it was his duty to have examined and told it, before he accepted thereof.

5 Rep. 115. The party, to whom some money was tendered, had accepted it, and put it into his purse: but upon examining it, before he left the place, he discovered some counterfeit pieces, and for this reason refused to carry it away. It was holden, that as he had not objected to the money before he did accept it, he could not do this afterwards.

Eq. Caf. A tender of a bank note, as money is not, strictly speaking, a  
Abr. 319. good tender: but if the tenderer offer to get money for the note,  
Austin v. this makes it a good tender.

The ex- cutors of Dredwell. [Although it hath never yet been determined, that bank-notes are a legal tender, yet the court of King's Bench have holden, that if such notes are presented in payment, and no objection is made to the receipt on that account, they are in that case a good tender. Wright v. Reed, 3 Term Rep. 554.]

It seems reasonable, that a tender of any sort of goods should, unless they are to be delivered according to some sample, be made in a middling kind of goods of the sort.

### (C) At what Place a Tender must be made.

Bro. Tend. IF a contract be, that money in gross, or rent issuing out of land,  
pl. 17. shall be paid, or that goods shall be delivered, at a place cer-  
Bro. Cond. tain, a tender can only be made at the place.  
pl. 17. Freem. 149.

Bro. Tend. If no place be appointed for the payment of money in gross, a  
pl. 17. tender must, if the person to whom the money is due be in *Eng-*  
1 Inst. 210. *land*, be made at the place where he is: but, if he be out of *Eng-*  
*land*, the party, who ought to pay the money, is not bound to go out of the realm to seek him.

1 Inst. 210. It was formerly holden, that the money due upon a mortgage, which is to be considered as money in gross, must, if no place be appointed for the payment thereof, be tendered to the person, if he be in *England*, at the place where he is.

But it has been holden in the court of Chancery, that a tender to the person is not in such case necessary.

1 Chan. Ca. The mortgagor, after the mortgage was forfeited, went to the  
29. mortgagee's house with money sufficient to redeem the estate, and  
Manning v. tendered it there: but it did not appear, that the tender was to the  
Barges. mortgagee, or that he was in the house at the time. This was holden to be a good tender.

2 P. Wms. Personal notice was given to the mortgagee, the day before the  
378. twenty-fifth day of *March* one thousand seven hundred and twenty-  
Gyles v. two, that the mortgagor would upon the twenty-fifth day of *Sep-*  
Hall. *tember* following, between the hours of ten and twelve in the forenoon,

forenoon, tender the principal money, which was one thousand pounds, and all interest due thereupon, in *Lincoln's Inn Hall*; and a tender was accordingly made. It was objected, that no place being appointed in the mortgage-deed for the payment of the money, the tender ought to have been made to the mortgagee in person: but the tender was holden to be good. And by Lord King, Chancellor—As the money was lent in town, and no objection was made by the mortgagee to the place, when notice of payment was given, it would be very hard to compel the mortgagor to travel with so great a sum of money to the place where the mortgagee lives.

If no place be appointed for the payment of rent issuing out of land, a tender upon the land is good; for it is not, in this case, necessary to make a tender to the person. 1 Inst. 210, 211.  
Bro. Tend.  
pl. 18. pl. 38.

But, although a tender to the person be not, in the case of rent issuing out of land, necessary, a tender to the person would, in such case, be good. Cro. Eliz.  
48. Crop  
v. Hamilton.

If a corporal service to the grantor be reserved in a grant of land, this must be tendered to the grantor in person; and the tenant must seek him, if he be in *England*. 1 Inst. 210, 211.  
Bro. Tend.  
pl. 17.

If no place be appointed for the delivery of heavy goods, the person whose duty it is to deliver them is not bound to tender them to the person to whom they ought to be delivered; for if he go to the person to inquire at what place he will receive them, and afterwards tender them at that place, this is a good tender. 1 Inst. 210.

### (D) At what Time a Tender must be made.

A Tender with costs may be made in a court of equity after a bill is filed. Bunb. 23.

But a tender cannot be made after an action is commenced. Bro. Tend.  
pl. 9.  
21 Jac. c. 16. s. 5.

In an action of trespass the defendant pleaded, that he tendered amends before the action was commenced, to wit, on the second day of *October*. The plaintiff replied, that before the tender he had sued out a *latitat*, *teste* the last day of the preceding *Trinity* term, and had thereupon procured the defendant to be arrested. Upon a demurrer this tender was holden to be void: for that a tender after the suing out of a *latitat*, as well as one after the suing out of an original writ, is void. Cro. Car.  
264.  
Watts v.  
Baker.

But, where a tender has in fact been made, before a writ was sued out, the court, out of which the writ issued, will upon application take care, that the tender shall not be made void, by the relation of the writ to a day anterior to the tender.

The defendant pleaded a tender, upon the fourth day of *May*, *ante diem exhibitionis billæ*. The plaintiff replied *non obtulit ante diem*; and, in order to oust the defendant of the benefit of the tender, made up the paper-book with a general memorandum. As by this means the writ would have related to the first day of the term, Str. 638.  
Smith v.  
Key.  
[1 Will. 39.  
Smith v.  
Raydon,  
Semb.  
S. C.]

term, which was before the fourth day of *May*, the court of Bing's Bench, upon an affidavit that the writ was not sued out till the sixth day of *May*, made a rule, that the plaintiff should make up the paper-book with a special *memorandum*, according to the truth of the fact.

Barn. 357.  
Hill v. Wil-  
liams.

A tender was pleaded to have been made upon the thirteenth day of *January*. The plaintiff replied an original *teste* the second day of *January*. Upon the application of the defendant, the court of Chancery ordered the *teste* of the original to be altered, from the second day of *January*, the common *teste* day of an original returnable on the octave of *St. Hilary*, to the sixteenth day of *January*, this being the day upon which the instructions for the original were left with the curfitor.

Wood v.  
Newton,  
1 Will. 141.

[In the King's Bench, if the defendant has pleaded a tender before the exhibiting of the bill, though the plaintiff may reply a *latitat* previous to the tender, yet the defendant may rejoin, that there was no cause of action at the time when the *latitat* issued.]

2 Inst. 107.  
8 Rep. 147.

In the case of damage-feasant, a tender may be made before the beasts are distrained, or between the time of distraining and impounding them.

Fitz. N. B.  
69.  
1 Inst. 107.  
8 Rep. 147.

If the tender be made before the beasts are distrained, the distraining of them afterwards is unlawful.

Fitz. N. B.  
69.  
1 Inst. 107.  
8 Rep. 147.

If it be made after the distress, but before the beasts are impounded, the impounding of them afterwards is unlawful.

5 Rep. 76.  
Pilkington's  
case.  
Cro. Eliz.  
813. 8 Rep. 147.

A tender after the beasts distrained are impounded is void: for as they are then *in custodia legis*, the person who distrained them has no power to deliver them.

[5 Term Rep. 433.]

Lutw. 1262.  
Alwaies v.  
Brown.

If divers beasts are distrained, and any one of them be impounded before a tender is made, the tender is void.

8 Rep. 147.

After the right of making a distress has been tried in an action of replevin, the plaintiff, after judgment for the avowant, may tender the damages; and if his cattle are not thereupon delivered, he may maintain an action of detinue.

Cro. Eliz.  
73.  
Allen v.  
Andrews.

In an action of debt upon a bond, conditioned for the payment of fourteen pounds at a place certain, upon *Michaelmas-day* or within one month after, the defendant pleaded, that two days before the end of the month he tendered the money at the place, and that no person was there to receive it. Upon a demurrer this tender was holden to be void. And by the court—It would be hard, that a tender when the plaintiff was absent should be good; and to compel him to attend the whole month would be very unreasonable.

Plowd. 172,  
173.  
Bro. Tend.  
pl. 41.  
5 Rep. 114.

If money is to be paid, or goods are to be delivered, at a place certain, upon or before a day certain, a tender cannot be made, before the last day limited for the payment or delivery.

In an action of *assumpsit* the plaintiff declared, that in consideration of seventy pounds by him paid to the defendant, the defendant promised to deliver certain goods at a place certain, upon or before the eighteenth day of *January*, and the plaintiff alleged, that the goods were not delivered at the place upon the eighteenth day of *January*. After a verdict for the plaintiff it was objected, that the breach of the promise is not well alleged in this declaration; it being only alleged, that the goods were not delivered upon the eighteenth day of *January*, whereas the promise might have been well performed, by delivering them upon any day before that day: but the declaration was holden to be good. And by the court—The defendant, as the eighteenth day of *January* was the last day limited for the delivery of the goods, could not have made a tender upon any day before, which would have been sufficient to have excused his delivering them upon that day.

12 Mod.  
421.  
Hammond  
v. Ouden.

Where money is to be paid, or goods are to be delivered, at a place certain, upon or before a day certain, the tender must not only be made upon the last day limited for the payment or delivery, but it must also be made at the uttermost convenient time of that day; for as one party has until the uttermost convenient time of that day to pay the money, or deliver the goods, it would be unreasonable, that the other should be obliged to attend for the receiving of the money or goods before that time.

1 Inst. 211.  
Plowd. 172,  
173.  
Bro. Tend.  
pl. 41.  
5 Rep. 114.

But, although the party, who ought to pay money, or deliver goods, has until the uttermost convenient time of the last day limited for the payment or delivery, to pay the money or deliver the goods, a tender is not good, unless there be, after it is made, time enough, before the sun sets, to examine and tell the money, or to examine and take account of the goods: for if a man should be compelled to receive either money or goods in the dark, there would be great danger of his being imposed upon.

Plowd. 173.  
1 Inst. 202.  
5 Rep. 114.  
3 Lev. 104.

Notwithstanding the law gives the uttermost convenient time of the last day, limited for the payment of money or delivery of goods, to pay the money, or deliver the goods; yet, as this is solely for the conveniency of both parties, that neither may be obliged to give longer attendance than is necessary, if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited for the payment or delivery, and a tender be made, the tender is good.

5 Rep. 114.  
1 Inst. 202.  
211.  
Cro. Eliz.  
14.

And it has been doubted, whether, if the party, who ought to pay money or deliver goods upon or before a day certain, give notice to the party to whom the payment or delivery ought to be made, that he will pay the money, or deliver the goods, upon some day before the last day limited for the payment or delivery, and afterwards make a tender at the uttermost convenient time of that day, the tender would not be good.

12 Mod.  
422.  
Freem. 433.

If the money which is to be paid, or the goods which are to be delivered, at a day certain cannot, by reason of a circumstance that is not in the power of either party, be paid or delivered at the uttermost time of that day before the sun sets, a tender, at

the uttermost convenient time that such payment or delivery can on that day be made, is good.

12 Mod.  
530. 533.  
Lancashire  
v. Killing-  
worth.

If the contract be to transfer stock upon a day certain, a tender of transferring may be made at the uttermost convenient time of that day, before the books are shut; for as the stock cannot be transferred after the books are shut, a tender, at the uttermost convenient time of that day before the sun sets, would be quite nugatory.

Salk. 624.  
Lancashire  
v. Killing-  
worth.  
12 Mod.  
533.

It seems to have been formerly holden, that if the contract be for transferring stock at a day certain, a tender may be made at the uttermost convenient time of that day, before the usual time of shutting the books.

But the contrary has been since holden.

Str. 777.  
Duke of  
Rutland v.  
Holford.  
Ld. Raym.  
686. S. C.

A transfer of stock was made at the uttermost convenient time before one of the clock, which was the usual hour for shutting the books: but the party, who had contracted for the stock, not being there to accept and pay for it, the transfer was vacated before the books were shut. As there was more business that day than could be transacted in the morning, the books were opened again in the afternoon; and divers transfers were made. Upon the trial of an action, brought for the money which was to have been paid on transferring the stock, the jury found for the plaintiff: but a new trial was granted. Upon the second trial, which was at bar, it was holden by the court of King's Bench, that the transfer was not a good tender: for that the general rule, which is that a tender must be at the uttermost convenient time of the day, ought not to be broke through, except in a case of necessity; and that in the present case there was no necessity to break through it; because, as the books were opened again in the afternoon, and the defendant might have been then ready to accept and pay for the stock, the tender ought to have been made at the uttermost convenient time before the shutting of the books in the afternoon.

1 Inst. 211.  
Dyer, 354.

If money is to be paid, or goods are to be delivered, at a place certain, notice, although no time be fixed for the payment or delivery, may be given to the party to whom the payment or delivery is to be made, that the money will be paid, or the goods delivered, upon a day therein mentioned; and a tender at the uttermost convenient time of that day is good.

8 Rep. 92.  
Frances's  
case.

If a man be bound to pay twenty pounds, some time during his life, at a place certain, the obligor cannot tender the money whenever he pleases; for then the obligee would be under a necessity of perpetual attendance: but, if he give notice to the obligee, that upon a day certain he will pay the money, a tender at the place at the uttermost convenient time of that day is good.

1 Inst. 202.  
211.  
5 Rep. 114.  
Co. Eliz.  
14.

Although no time be fixed for the payment of money, or delivery of goods, at a place certain, if the party, who ought to pay the money or deliver the goods, accidentally meet the party, to whom the payment or delivery ought to be made, at any time at the place, he may then make a tender.

(E) To whom a Tender must be made.

A Tender may be made to any person, in whom, either as a party or privy, the right to the thing tendered is.

A tender to an executor is good; because the right of his testator to the thing tendered, is devolved upon him as a privy in representation. Cro. Jac. 245. Ratcliffe v. Davies. 4 Rep. 123.

A tender to an executor, even before he has proved the will of his testator, is good, provided that he afterwards prove it; because he thereby becomes an executor *ab initio*. Eq. Caf. Abr. 319. Austin v. The Executors of Dodwell.

If a bond be entered into, with condition to pay money to *J. S.* or his assign, and the bond is assigned, a tender may be made to the assignee; because he is a privy to the condition. Moor, 37. Bro. Tend. pl. 1.

*Hale*, Ch. Justice, seems to have been of opinion, that if the conufee of a statute-merchant, after extending the land, assign it over, a tender to the assignee is not good; for that the tender ought to be made to the conufee. 1 Vent. 211.

But in another book it is laid down, that a tender may in such case be made to the assignee; and a doubt is made, whether a tender to the conufee after the assignment would be good. Bro. Tend. pl. 38.

A tender to a stranger is not good.

If the condition of a bond be to pay money to a stranger, a tender to the stranger will not save the penalty. Cro. Eliz. 755. Huish v. Phillips. 12 Mod. 441. Moor, 37.

But, if a bond be entered into by *A.* with condition for the payment of money to *B.* to the use of *C.*, a tender to *C.* is good; because as the obligation is for his benefit, *C.* is not to be considered as a stranger, but as a trustee for *B.* Cro. Eliz. 755. Huish v. Phillips.

It is laid down, that a tender of amends to a bailiff, who has distrained beasts damage-feasant, is not good; because, as he is only a servant, he has no power to deliver the beasts. 5 Rep. 76. Pilkington's case, Pasch. 45 Eliz.

And the authority of this case has been recognized as law in two subsequent cases. 1 Brownl. 173. Roberts v. Young, Hil. 9 Jac. 1. Cro. Jac. 377. Wingfield v. Bell, Mich. 13 Jac. 1.

*Holt*, Chief Justice, did indeed, in a case subsequent to these three cases, declare himself dissatisfied with the determination as to this point in *Pilkington's* case. 12 Mod. 354. Horn v. Luines.

But it does not appear that there has been any determination contrary thereto.

[In *assumpsit* for work and labour, there was a plea of tender, upon which issue was joined. The evidence for the defendant on the tender was, that being indebted to the plaintiff in the sum claimed by the action, he had sent the money by his maid-servant to the plaintiff's house. She swore that she carried it to the plaintiff's house, and that seeing a servant there, who informed her that

her master was at home, she delivered the money to that servant to be delivered to her master; that the servant took it, and went into the house, as she supposed, to deliver it to the plaintiff, and returned with an answer that he would not receive it, but that she must go to his attorney. It was objected, that this was not a legal tender, there being no evidence of its being made to the party himself. But Lord *Kenyon* said, that in the common transactions of life, this kind of intercourse by the intervention of servants must be allowed; and that if money was so brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was evidence to be left to the jury, from which they might infer that a tender was made. The defendant had a verdict.]

### (F) The Consequences of a Tender and Refusal.

**A** Tender by one party, of paying a debt or performing a duty, and a refusal by the other to accept thereof, do in some cases amount to a payment of the debt, or a performance of the duty.

But it will appear, that the discharge is in such cases an accidental and not a necessary consequence of the tender and refusal; the debt or duty being discharged, because the cases were so peculiarly circumstanced, that there was not, after the tender and refusal, any remedy to enforce the payment of the debts, or the performance of the duties.

1 Inst. 207. If *A.*, without any debt or duty preceding, infeoff *B.* of land, with condition for the payment of a hundred pounds to *B.* in the nature of a gratuity, and *A.* tender the money to *B.*, and *B.* refuse to accept it, the land is thereof discharged for ever: because, as the hundred pounds is collateral to the land, *B.* has no remedy for the recovery thereof.

1 Inst. 207. If a single bond be entered into, for the payment of twenty pounds to the obligee, and afterwards a deed be made, that upon the payment of ten pounds, the bond shall be void, and the obligor tender the ten pounds, and the obligee refuse to accept it, the obligor is discharged for ever; for the obligee, the ten pounds being collateral to, and not parcel of, the sum mentioned therein, cannot recover it in an action upon the bond, and he has no remedy to recover the sum mentioned in the defeasance.

1 Inst. 207. If a man enter into an obligation, in the penalty of a hundred pounds, with condition to perform an award, or to do some other thing for the benefit of the obligee, which it was not incumbent upon the obligor to do at the time of entering into the obligation, a tender by the obligor of performing the award, or of doing the other thing, and a refusal by the obligee to accept thereof, are a perpetual bar to an action upon the obligation: for, as the condition is satisfied by the tender and refusal, the penalty cannot be recovered; and as the performing of the award, or doing the other thing, which it was not incumbent upon the obligor to do at the time

9 Rep. 79.  
Bro. Tout  
temps prist,  
pl. 31.  
2 Roll. Abr.  
523.  
Cro. Eliz.  
755.

209.  
Bro. Tout  
temps prist,  
pl. 1. pl. 2.  
pl. 31. pl. 31.  
9 Rep. 79.  
2 Roll. Abr.  
523.  
Cro. Eliz.  
755.  
1 Show.  
129.



time of entering into it, could not be parcel of the obligation, no action lies thereupon to compel the performance of the award, or the doing of the other thing.

And it would make no difference, if, in the case of an obligation for performing an award to be made after the obligation was entered into, the payment of money is awarded: for, if a tender of the sum awarded be made by the obligor and refused by the obligee, no action lies upon the obligation; the money being in this case no more parcel thereof, than any other thing, which might have been awarded, would have been.

3 Lev. 24.  
Genne v.  
Tinker.  
Salk. 75.

But, where an obligation is entered into for performing a duty for the benefit of a stranger, the obligor, although the duty be collateral to and not parcel of the obligation, is not discharged by a tender of performing the duty, and the refusal of the stranger.

If *A.* be bound in an obligation to *B.*, with condition to infeoff *C.*, and a tender be made by *A.* of infeoffing *C.*, and *C.* refuse to be infeoffed, the obligation is forfeited: for as the obligor hath at his peril taken upon himself to infeoff *C.*, his refusal who is a stranger does not satisfy the condition, and consequently an action will lie upon the bond.

1 Inst. 209.  
5 Rep. 23.

But, if *A.* enter into a bond to *B.*, with condition to infeoff *C.* to the use of *B.*, and a tender be made of infeoffing *C.*, who refuses to be infeoffed, the obligation is saved: for, as the act was in this case to be done for the benefit of *B.*, *C.* is not to be considered as a stranger, but as a trustee for *B.*

1 Inst. 209.  
Cro. Eliz.  
755.  
Cro. Jac. 14.

If the condition of an obligation be, that the obligor shall pay a sum of money to the obligee, in pursuance of an award made before the obligation was entered into, a tender and refusal of the money awarded is no discharge thereof: for, although the condition of the bond be thereby so far satisfied that the penalty cannot be recovered, the money awarded, which is in this case parcel of the obligation, continues to be due, and may be recovered in an action upon the obligation.

2 Roll. Abr.  
524.

In any case however, where the debt or duty would not otherwise have been discharged by a tender and refusal, if the party, to whom the tender has been made, take issue upon the tender, and it be found against him, the debt or duty is discharged; for it was at his peril to take an issue, by the finding of which his refusal is become matter of record.

1 Inst. 207.  
Bro. Tout  
temps pritt,  
pl. 32.  
Salk. 597.  
Sty. 388.

Notwithstanding the party, who has made a tender of paying a debt, or performing a duty, be not thereby discharged of the debt or duty, although the other party refuse to accept thereof, he is by the tender and refusal discharged of the damages, to which he would otherwise have been liable, by reason of the non-payment of the debt, or the non-performance of the duty.

If *A.* borrow a hundred pounds of *B.*, and afterwards mortgage land to *B.*, with condition for the payment thereof. In this case, if *A.* tender the money, and *B.* refuse to accept thereof, the land is discharged, and *B.* shall not be liable to damages for non-payment of the debt; but the debt, which existed before the mortgage, remains, and may be recovered in an action.

1 Inst. 209.

Bro. Tout  
temps priit,  
pl. 24.

If a corporal service be due from a tenant to his lord, a tender of the service by the tenant, and a refusal by the lord to accept thereof, are a discharge of damages for not having done it: but, as the lord has the same remedy to compel the doing of the service, as he had before the tender and refusal, it is not thereby discharged.

1 Inst. 207.  
Bro. Tout  
temps priit,  
pl. 31.

2 Roll. Abr.  
523, 524.  
Salk. 623.  
Id. Raym.  
254.

If an obligation be entered into in the sum of twenty pounds, with condition for the payment of ten pounds, and the obligor tender the ten pounds, and the obligee refuse to accept it, the obligor is discharged of damages for non-payment thereof: but an action will still lie upon the obligation for the ten pounds, it being parcel of the sum mentioned in the obligation.

2 Freem.  
174.  
Manning v.  
Burgeis,  
2 Chan. Ca. 206.

If the money due upon a mortgage carrying interest be tendered to the mortgagee, and he refuse to accept thereof, the mortgagor is discharged of interest from the time of making the tender.

2 P. Wms.  
378.  
Gyles v.  
Hall.  
2 Chan. Ca.  
306.

But in order to entitle a mortgagor, in such case, to a discharge of interest, it must appear, that he has ever since the tender and refusal kept the money ready for paying off the mortgage, and that no profit has been made of it.

A right to damages, on the account of the non-payment of a debt, or the non-performance of a duty, may, after being taken away by a tender and refusal, be restored by a demand subsequent to the tender and refusal; for if the debt or duty be not discharged by the tender and refusal, a new right to damages accrues, from the non-payment or the non-performance upon the subsequent demand.

1 Brownl. 71.

If *A.* have tendered a sum of money to *B.*, and *B.* have refused to accept thereof: yet, if a demand be afterwards made by *B.* and the money be not paid, *A.* is liable to damages for non-payment from the time of the demand.

Hob. 207.  
Cranley v.  
Kingwill.

A distress may, after a tender and refusal, be made for rent in arrear; and in this case a demand subsequent to the tender and refusal is not necessary, the distress itself being a demand in law.

If a demand of a sum of money carrying interest be made after a tender and refusal to accept the same, and the money be not thereupon paid, interest begins again to grow due from the time of the demand.

It was formerly holden, that if a man, in consequence of an act to be done by him, would acquire a right to a debt or duty, he does not acquire the right, unless the thing first to be done by him have been actually done.

Str. 481.  
London v.  
Craven.

*A.* by indenture covenanted to pay a sum of money to *B.*, and *B.* covenanted by the same indenture to execute, upon the receipt thereof, a release of his claim to certain land. The money being tendered by *A.*, *B.* refused to accept it; and did not execute the release. An action of covenant was hereupon brought: but the court were of opinion, that as *B.* was only bound to execute the  
release

release upon receiving the money, and it had not in fact been received by him, there was not a sufficient breach of covenant to ground an action upon.

But the law is now settled, that where a man would upon doing a previous act have acquired a right to a debt or duty, this is as completely acquired, if he make a tender of doing the previous act, and the other party refuse to suffer it to be done, as if it had been actually done.

530. Ld. Raym. 964. Str. 777. [Dougl. 694. 1 Term Rep. 638. 645.]

An agreement was made, that *A.* should pay a sum of money to *B.*, and that *B.* should, upon the payment thereof, surrender a certain lease to *A.* The money was tendered by *A.*; *B.* refused to accept thereof, and did not surrender the lease. An action being hereupon brought, it was holden, that *A.* could as well maintain the action against *B.* for not surrendering the lease, as if the money had been actually paid.

In an action of covenant the plaintiff declared, that the defendant had covenanted to accept a transfer of one thousand pounds *Hudson's-Bay* stock, and upon the transfer thereof to pay the plaintiff two thousand pounds; and the plaintiff averred, that he offered to transfer the stock, and that the defendant did not come to accept or pay for the same. It was holden, upon a demurrer to the declaration, that the plaintiff was as well entitled to the money, as if he made an actual transfer of the stock.

(G) The Consequences of being ready to tender, when the Party to whom it was intended to have been made was not present.

THE consequences of a tender and refusal have been treated of at large under the foregoing head.

It is by no means necessary to recite any of the cases thereunder cited.

Nothing more is required, under the present head, than to observe, that every consequence, which would have followed from a tender and refusal, will follow, from being ready to tender; in case the person, whose duty it was to be present at the place, where the tender was intended to have been made, neglected to be present.

If every such consequence did not follow, it would frequently happen, that, notwithstanding one party has done all that was in his power to make a tender, all would be rendered ineffectual by the wilful absence of the other party.

Cro. Jac.  
245.  
2 Saund.  
352.  
Salk. 75.  
523.  
12 Mod.  
638. 645.]

Cro. Eliz.  
889.  
Lea v.  
Exelby.

Ld. Raym.  
686. Lan-  
cashire v.  
Killing-  
worth.

## (H) Of pleading a Tender.

## 1. In the general.

Salk. 624.  
Lancashire  
v. Killing-  
worth.

**E**VERY requisite, which is necessary to the validity of a tender must in pleading the tender be shewn to have been complied with; else the plea, for want of shewing that the party tendering has done all that was in his power to pay the debt or perform the duty, is not good.

Cro. Jac.  
423. Furler  
v. Proud.  
Salk. 624.

A plea of tender at the day was holden to be bad; because it was not alleged, that the tender was made at the uttermost convenient time of the day.

12 Mod.  
531. Lan-  
cashire v.  
Killing-  
worth.  
Salk. 624.  
Ld. Raym.  
688.

In an action of covenant, for money due upon a contract for transferring stock, the plaintiff alleged, that he was ready at the day and place, and offered to transfer the stock. The declaration was holden to be insufficient, for want of shewing the tender to have been made at the uttermost convenient time of the day that the stock could have been accepted.

Str. 777. 833.

3 Lev. 104.  
Cole v.  
Walton.  
2 Lev. 209.  
12 Mod.  
353.  
Noy, 74.

In an action of debt for rent, the defendant pleaded, that at the day on which the rent became due he was ready to pay it. The plea was holden to be bad; because it was not alleged, that he offered to pay the rent; for it is the tender, and not the being ready, which is traversable.

Sid. 13.  
2 Lev. 23.  
2 Ventr.  
109.  
Salk. 623.  
12 Mod.  
530. Ld. Raym. 687. 964.

If the party, to whom a tender was intended to have been made, was present at the time of tendering, or if it do not appear, from the pleadings, that he was absent, it must be averred that there was a refusal; for the refusal, as well as the tender, is traversable.

2 Saund.  
352.  
Peeters v.  
Opie.

An agreement was, that the plaintiff should build a house for the defendant; and that the defendant should pay the plaintiff a sum of money for his labour in building it. In an action for the money the plaintiff averred, that he had made a tender of building the house; but he did not aver, that the defendant had refused to suffer him to build it. It was holden, that the declaration was insufficient, for want of shewing a refusal by the defendant.

Cro. Eliz.  
389.  
Lea v.  
Exelby.

*A.* promised to pay a sum of money to *B.* at a day and place certain; and *B.* promised to surrender upon the payment thereof a certain lease to *A.* In an action of *assumpsit* brought by *A.*, he alleged, that he had tendered the money at the day and place; and that *B.* had not surrendered the lease. All the court held, that the allegation of the tender was ill; it not being enough for *A.* to say, that he tendered the money; but he ought to have said further, that the defendant did not come to the place, or that he refused to receive the money.

Ld. Raym.  
687. Lan-  
cashire v.

But, if the party, to whom a tender was intended to have been made at a place certain, did not come to the place, it is sufficient for

for the party, who intended to make a tender, to allege, that he was at the place with design to make a tender; and that the other party did not come to the place.

Salk. 623. 12 Mod. 530.

It was heretofore a question, whether it ought not in such case to be averred, that neither the party nor any one for him did come to the place; and in some precedents the averment is in this manner.

12 Mod.  
531. Cro.  
Eliz. 755.  
Cro. Jac.  
423.

But it seems to be now settled, that it is in such case sufficient to aver, that the party did not come to the place; for if any one lawfully authorized to receive the thing intended to have been tendered had come, it would have been the same thing, as if the party had himself come.

Cro. Eliz.  
755.  
Huifh v.  
Phillips.  
Cro. Jac.  
14. 12 Mod.  
531.

[If *A.*, *B.*, and *C.* have a joint demand, and *C.* has a separate demand on *D.*, and *D.* offers *A.* to pay him both the debts, which *A.* refuses, without objecting to the form of the tender on account of his being entitled only to the joint demand, *D.* may plead this tender in bar of an action on the joint demand, but should state it as a tender to *A.*, *B.*, and *C.*]

Douglas v.  
Patrick,  
3 Term Rep.  
683.

If the debt or duty be discharged by a tender and refusal, the plea of tender ought to conclude with praying judgment of the action; for by the tender and refusal the action is in such case barred for ever.

1 Inst. 207.  
9 Rep. 79.  
Bro. Tout  
temps priſt,  
pl. 1. pl. 2.  
pl. 21. pl. 31.  
Carth. 143.

2 Roll. Abr. 523. Cro. Eliz. 755.

But, if only damages are discharged by a tender and refusal, the plea of tender ought to conclude with praying judgment of the damages: because the tender and refusal are in such case only a bar of damages.

Ld. Raym.  
254.  
1 Inst. 207.  
Bro. Tout  
temps priſt,  
Carth. 143.

pl. 24. pl. 31. 2 Roll. Abr. 523. Salk. 623.

As the damages barred by a tender and refusal are only those which are occasioned by the non-payment of the debt, or the non-performance of the duty, the plea of tender in an action of *assumpsit* must never conclude with praying judgment of the damages: for as this action is only to recover damages, a plea in bar of the damages would in effect be a plea in bar of the action. The proper way of pleading a tender in an action of *assumpsit* is, either to confess damages to a certain amount, and pray that the plaintiff may proceed at his peril for the residue; or to bring a sum of money into court, and pray judgment *de ulterioribus damnis*.

Ld. Raym.  
254. Giles  
v. Hartis.  
Salk. 623.

It has been holden, that a plea of tender is an issuable plea.

Pay v.  
Deafley, Barnes, 361.

But, if a judge's order has, upon the condition of pleading an issuable plea, been obtained for time to plead, a tender cannot be pleaded; this not being an issuable plea within the meaning of such order.

Rep. of Pr.  
in C. B.  
134.  
Barnes, 252.  
Lane v.  
Smith.

Davenhill v. Barritt, Barnes, 337. [But the contrary has been since adjudged in the court of King's Bench. Kilwick v. Maidman, 1 Burr. 59.]

It

Barnes, 359. It has been refused to suffer the general issue and a plea of tender to be pleaded to the same count (a); because these two pleas are contradictory. [(a) Or to the whole declaration. Maclellan v. Howard, 4 Term Rep. 194. But in both these cases the actions were upon promises. In *trespass*, the defendant may plead the general issue and tender of amends. Gerring v. Manning, Barnes, 366. Martin v. Kesterton, 2 Bl. Rep. 1093.]

Barnes, 362. But, if there be two counts, this court will give leave to plead a tender to one count, and the general issue to the other.

Morey.  
Barnes, 330. A motion being made, that the defendant might withdraw his plea of tender, and plead the general issue, it was denied. And by Reeves v. the court—The suffering of this, as the money pleaded to have Probart. been tendered is brought into court, may be an inconvenience to the plaintiff.

## 2. Where *Uncore priſt* is pleaded.

Bro. Tout Wherever a debt or duty is discharged by a tender and refusal, it is not necessary, in pleading the tender, to plead *uncore priſt*: pl. 1. pl. 2. nay, it would be strange for a party to say, he is still ready to pay pl. 21. a debt, or to perform a duty, of which he is discharged. pl. 31.  
2 Roll. Abr. 523. 1 Inst. 207. Cro. Eliz. 755. 1 Show. 129.

Bro. Tout But, where a debt or duty is not discharged by a tender and refusal, it is not enough, for the party who pleads the tender, to pl. 1. pl. 2. plead a tender and refusal, but he must also plead *uncore priſt*. pl. 21.  
pl. 31. 1 Inst. 207. 2 Roll. Abr. 523. Cro. Eliz. 755. 1 Show. 129.

Bro. Tout If any service, which ought to have been done to a lord at a temps priſt, day certain, has been tendered at the day, the party who pleads pl. 24. this tender must not only allege, that he tendered the service at the day; but as the service continues to be due, he must also plead, that he is still ready to do it.

1 Inst. 207. In an action of debt upon a bond, conditioned for the payment of a less sum at a day certain, a plea of tender at the day is not Bro. Tout good; for as the less sum still remains due, the defendant must temps priſt, further say, that he is still ready to pay it. pl. 31.  
2 Roll. Abr. 523. 534. Salk. 623. Ld. Raym. 254.

Sid. 30. In an action of debt upon a bond, the condition was to pay Hobson v. money at a day certain, but no place was appointed for the payment. The defendant pleaded, that the plaintiff was not in *England* at the day. This plea was upon a demurrer holden to be Rudge. bad, for want of pleading *uncore priſt*.

2 Show. 143. In an action of debt upon bond, with condition to pay money to the administrators of the obligee within two months after his death, the defendant pleaded that he was ready to have paid it, but that no letters of administration were granted within two months after the death of the obligee, and consequently that there was no administrator to receive it. Upon a demurrer this

plea was holden to be bad; because as the debt was not discharged, the defendant ought to have pleaded, that he is still ready to pay it.

But, if a tender at the day of corn, or of any other goods of a perishable nature, be pleaded, with a refusal, there is no need to plead *uncore prift*; for as such goods may have perished, and if they have not, as it might have been an expence to keep them, it would be hard to compel a party to be ready at all times after the tender and refusal to deliver them.

The doctrine of this case seems to apply to all kinds of goods which are bulky; for there must always be an expence, in finding a warehouse for such goods.

*Uncore prift* may be pleaded after either a general or special imparlance.

9 Rep. 79.  
Peyton's  
case.  
1 Inst. 207.

Dyer, 300.  
Sid. 364.  
12 Mod. 8. 354. Ld. Raym. 254.

### 3. Where *Uncore prift* together with *Tout temps prift* is pleaded.

Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads a tender, to plead the tender and refusal with *uncore prift*; but he must likewise plead *tout temps prift*.

Salk. 622.  
623.  
12 Mod.  
152.  
Ld. Raym.  
254.  
Carth. 413.

Comb. 444.

In an action of *assumpsit*, for the money due for goods sold and delivered, the defendant pleaded a tender before the action was brought, and that he is still ready to pay the money. It was objected, that as the money became due upon the delivery of the goods, the defendant ought to have pleaded, that he has been at all times, from the time of the delivery, and is still ready to pay the same. This was holden to be a material objection.

10 Mod. 81.  
Whitlock v.  
Squire.

If the defendant have pleaded *tout temps prift*, the plaintiff may reply a demand between the time of the contract and the tender, and shew the time of making it; for he was not bound to allege such special demand in the declaration.

Ld. Raym.  
254.  
Giles v.  
Hartis.  
Salk. 623.  
12 Mod. 153.

A defendant, after a *nihil* had been returned to the original, came at the *capias*, and pleaded *tout temps prift*. It was holden, that as it appeared from the return of *nihil*, that he had not consufance of the original, the plea was good: but, that if he had had consufance of the original, he would, because he did not plead *instante*, have been estopped to plead *tout temps prift*.

Bro. Tout  
temps prift,  
pl. 37.

*Tout temps prift* may be pleaded after an effoin cast; for, although this plea be a kind of imparlance, as the effoin may have been cast by a stranger, it is not clear that the defendant had consufance of the writ.

1 Inst. 131.  
Bro. Tout  
temps prift,  
pl. 20.  
pl. 36. 2 Roll. Abr. 523.

It is laid down in divers books, that *tout temps prift* cannot be pleaded after a general imparlance by the defendant.

Salk. 622. 12 Mod. 8. 72. 84. 354. Freem. 205.

The reason assigned in two books, why the defendant cannot plead *tout temps prift* after a general imparlance by him, seems to be

Bro. Tout  
temps prift,  
pl. 27.  
Freem. 205.

2 Mod. 62.  
Anon.  
Freem. 105.

be very conclusive; namely, that after he has desired to imparl before he answers to the declaration, it is a contradiction to say, that he has been always ready to satisfy the demand of the plaintiff.

Barnes, 343.  
King v.  
Nichols. But, where a general imparlance is given by the plaintiff, the court will, within the first four days of the next term, that he may have an opportunity of pleading *tout temps priſt*, make a rule for the defendant to plead a tender as of the preceding term.

Barnes, 357.  
Brown v.  
Hagan. And if after a general imparlance given by the plaintiff, the declaration be delivered so short a time before the effoin-day of the next term, that the defendant's agent has not time to write into the country, and receive instructions so as to move the court within the first four days of the next term, the court will, if the application be as soon after the first four days as it can conveniently be made, give leave to plead a tender as of the preceding term.

It is not perhaps quite settled, but it seems to be the better opinion, that *tout temps priſt* may be pleaded after a special imparlance.

Freem. 134.  
Bone v.  
Andrews. In an action of *assumpsit* the defendant imparled specially, *salvis omnibus exceptionibus tam brevi quam narrationi*; and the question was, Whether *tout temps priſt* could be pleaded after this imparlance? It was holden, that it might.

It is in the general true, that *tout temps priſt* cannot be pleaded after a demurrer.

But the court will after a demurrer, upon the particular circumstances of the case, give a defendant leave to plead as of a former term, or compel a plaintiff to declare as of a subsequent term.

Barnes, 359.  
Roberts v.  
Hughes. A declaration of *Hilary* term being demurred to for insufficiency, the plaintiff obtained a judge's order to amend, and in the *Easter* term following gave a rule to plead. Hereupon the defendant obtained a rule, in order to have an opportunity of pleading *tout temps priſt*, that he might plead as of the *Hilary* term, or that the plaintiff might make his declaration as of the *Easter* term.

#### 4. Where a *Profert in Curia* is pleaded.

Bro. Tout  
temps priſt,  
pl. 15.  
pl. 25.  
pl. 31.  
pl. 41.  
pl. 43.  
2 Roll. Abr.  
524.  
12 Mod.  
354.  
Ld. Raym. 83. 254. 643. 1 Barn. 131. Str. 638. It is in the general true, that if a debt or duty be not discharged by a tender and refusal, the tender must be pleaded with a *profert in curia*: for as the debt or duty continues, it is not enough for the party, who pleads the tender, to plead a tender and refusal with *uncore priſt*, or with *uncore priſt* together with *tout temps priſt*, as the case may require; but he must also bring the money, or other thing which has been tendered, into court, that the other party may, if he please, accept thereof.

Ld. Raym.  
643.  
Horn v.  
Lewin. If a defendant in an action of debt upon a bond, with condition for the payment of a less sum at a day certain, plead a tender with *uncore priſt*, the plea is not good without bringing the money into court.

So,



So, in an action of debt for money due for rent, if a tender be pleaded with *uncore prift*, together with *tout temps prift*, the money must be brought into court.

Bro. Tout  
temps prift,  
pl. 25.  
12 Mod. 354.

It has indeed been holden, that if the contract be to pay money at a place certain, it is not necessary, in pleading a tender, to bring the money into court; because the party is not bound, to pay the money at any other place.

Bro. Tout  
temps prift,  
pl. 6. pl. 35.

But it seems to be the better opinion, that it is not sufficient for a party to plead in such case, that he is still ready to pay the money at the place, for that he ought to bring it into court.

Bro. Tout  
temps prift,  
pl. 43.  
2 Roll. Abt. 524.

A plea of tender with a *profert in curia* is not good, unless the money, or other thing tendered, be in fact brought into court.

A defendant had pleaded a tender of money with a *profert in curia*; but it appeared, that the money was not brought into court. It was holden, that the plea was not good, and that the plaintiff might sign judgment.

Str. 638.  
Pether v.  
Shelton,

If there are several avowries, against several tenants, for the same rent-charge, it is not necessary for every tenant, who pleads a tender, to bring the money into court.

A distress being made upon several tenants for one rent-charge issuing out of the lands holden by them all, every one brought an action of replevin. As the grantee of the rent-charge made the same avowry against them all, each tenant pleaded in bar of the avowry against him a tender with a *profert in curia*. The court made a rule, that the bringing in of money upon one avowry should be good as to all the avowries.

Ld. Raym.  
429. Anon.

If the thing, which has been tendered, be so heavy, that it cannot conveniently be brought into court, it is not necessary to plead a tender with a *profert in curia*.

Bro. Tout  
temps prift,  
pl. 3.  
2 Roll. Abr. 524. 1 Barn. 200.

It must however in such case be alleged, that the thing cannot, by reason of its weight, conveniently be brought into court.

Bro. Tout  
temps prift,  
pl. 3.  
2 Roll. Abr. 524.

## (I) The Consequences of a *Profert in Curia*.

IT is in the general true, that if the money, or other thing which has been tendered, be upon pleading the tender brought into court, the plaintiff is entitled thereto, although he should afterwards be nonsuited, or there should be a verdict against him.

In an action of *assumpsit* the defendant pleaded a tender, and brought four guineas into court. The plaintiff replied a demand and refusal subsequent to the tender. Issue being thereupon joined, it was found for the defendant. The defendant afterwards moved to take the money out of court; but it was refused. And by the court—He has admitted that this money was due to the plaintiff, and he is no more entitled to have it again, than if it had been brought into court upon the common rule, and stricken out of the declaration.

Str. 1027.  
Cox v.  
Robinson.

There is perhaps no case of nonsuit, which is expressly to this point.

Salk. 597. But it is laid down, that, if after money has been brought into court upon the common rule, the plaintiff be nonsuited, he is entitled to the money; and it seems as reasonable, that the plaintiff should be entitled to it, after having been nonsuited in the case of a tender with a *proposit in curia*, as in the case of bringing in money upon the common rule.

1 Inst. 207. If the plaintiff take issue upon the tender, and it be found against him, the defendant shall have the money again; for it was at the plaintiff's peril to take an issue, by the finding of which his refusal is become matter of record.

Bro. Tontemps prift, pl. 32.  
Sty. 388.  
Salk. 597.

In any case, wherein the plaintiff is entitled to the money, or other thing, which has upon a plea of tender been brought into court, he must, in case he does take it out of court, pay the defendant costs.

If a plaintiff have proceeded in his suit, after money was brought into court upon a plea of tender, he cannot afterwards take the money out of court, without the leave of the court.

Barnes, 357. The plaintiff, after replying to a plea of tender, took the money which had been brought in, out of court, and entered an acquittal. It was holden, that as the replication amounted to a refusal of accepting the money, the plaintiff could not afterwards take it out of court, and enter an acquittal, without leave of the court.

*Ibid.* But the court will always give a plaintiff leave, to do this upon paying the defendant costs.

Cro. Jac. 126. If the plaintiff take the money, or other thing which has been brought in, out of court, he cannot afterwards proceed for damages, on the account of a demand and refusal subsequent to the tender: for as the judgment, which ought, in such case, to be entered up, is *quod* the defendant *eat inde sine die*, the plaintiff is barred from having judgment of the principal; and a man cannot proceed for damages merely accessory, after being barred of the principal, in any action, except an ejectment, wherein the term expires, pending the action.

Ld. Raym. 643. 774.

## (K) Of bringing Money into Court upon the common Rule.

**M**ONEY cannot be brought into court upon the common rule, without leave of the court.

The practice, of giving leave to bring money into court upon the common rule, is not very ancient.

Salk. 597. Holt, Chief Justice, is reported to have said, that he remembered the time, when motions for leave to do this were first made.

Str. 787. The practice was introduced, for the sake of giving a party, who had never had it in his power to make a tender, or had neglected to make one, an opportunity of satisfying the debt for which an action had been commenced; and likewise to deliver him

White v. Woodhouse.

him from the difficulty of pleading the tender, if he had made one.

Money cannot be brought into a court of equity, but a tender may be relied upon in the answer to a bill in equity. Bunb. 28. 47.

The sum of money, which is to be brought into court upon the common rule, is always mentioned in the rule.

Money cannot be brought into court upon the common rule, after the defendant has pleaded.

If a party have obtained the common rule to bring a certain sum of money into court, the court will not give him leave after having pleaded, to bring in more money than is mentioned in the rule.

A defendant, who had obtained the common rule to bring seventy-nine pounds and one shilling into court, afterwards moved for leave to bring in one pound and four shillings more: but it appearing that he had pleaded, the court refused to give leave to do this. Green v. Beaton. Barnes, 286.

A defendant, who had obtained the common rule for bringing money into court, brought the sum therein mentioned into court. The plaintiff refused to accept thereof; and issue was joined in the action. Afterwards the defendant applied for another rule, to make an addition to the sum brought in. No rule was granted. And by the court—This was a subterfuge of the defendant, to try if the plaintiff would accept less than is due; and as this would not do, he now wants to bring more money into court, which the court never gives leave to do, after issue is joined in an action. Barnes, 282. Swan v. Freeman.

If there are three counts in a declaration, the defendant may have a rule to bring money into court upon one, and plead to the other two. Barnes, 286. Heilier v. Mallet.

But he cannot in such case have a rule to bring money into court upon one count, to plead to another, and to demur to the third. Rep of Pract. in C. B. 48.

The common rule for bringing money into court is very seldom granted, without annexing the condition of paying costs.

But, as the old form of the common rule for bringing money into court is not compulsory, as to the payment of costs, in case the plaintiff shall think proper to accept the money, the court of King's Bench, in which court the old form is still adhered to, will not grant an attachment for the non-payment of costs.

In an action of *assumpsit* the defendant brought eight pounds into court, upon the common rule. The plaintiff took it out, and, after taxing costs, demanded them. As these were not paid, he went on to trial, and obtained a verdict for seven pounds eighteen shillings. It was insisted, that as the plaintiff was overpaid by the money taken out of court, he ought not to have costs of the proceedings subsequent to the bringing of it in: but the court held, that this case was to be considered, the terms of the rule not having been complied with, as if no rule had been made; and that in such case it is not usual to grant an attachment, but the plaintiff, as the rule is only a conditional one, may go on. Str. 1220. Hand v. Dinely.

The *poslea* was ordered to be delivered to the plaintiff: but it was ordered, that he should upon taking out execution deduct for the money he had taken out of court.

**Barnes, 283.** The old form, of the common rule for bringing money into court, having been adjudged by the court of Common Pleas defective, for want of being compulsory upon the defendant as to the payment of costs, in case the plaintiff shall think proper to accept the money, it has been, of late years, altered, so as to be compulsory; and, consequently, an attachment against the defendant may be had in that court, if the costs are not paid.

A case may be so circumstanced, that the court will give leave to bring money into court upon the common rule, without annexing the condition of paying costs, in case the plaintiff shall think proper to accept the money.

**MS. Rep.** In an action of debt for rent it appeared, that there had been a tender of the rent before it was due; that the plaintiff had kept out of the way all the day on which it did become due, in order to deprive the defendant of an opportunity of tendering the rent that day; and that the action was commenced the next day. The defendant, who had before obtained the common rule to bring money into court with costs, in case the plaintiff shall think proper to accept the money, afterwards obtained another rule, that the plaintiff might, instead of receiving costs, pay the defendant costs. The latter rule was afterwards discharged: but so much of the former rule as related to costs, was discharged likewise.

**Johnson v. Holditch.**  
**East. 31 G.**  
**2. in K. B.**  
**1 Bur. 578.**  
**S. C.**

And by Lord *Mansfield*, Chief Justice—Upon the particular circumstances of a case, the court has a power, although the general rule be otherwise, to give leave to bring money into court upon the common rule without costs; and the present, wherein the plaintiff kept out of the way on purpose to avoid a tender of the rent, is a proper case to give such leave in. It is, in the general, of course to allow costs, where leave is given to amend: but the court may, upon the particular circumstances of a case, give leave to amend without costs. And by *Dennison*, Justice—The court has certainly a power, where the justice of a particular case requires it, to dispense with a part of one of its rules, which can only be adapted to general cases.—And by *Foster*, Justice—There is perhaps no case, where costs are more generally given, than upon the granting of a new trial; and yet a case may be so circumstanced, as to make it proper for the court to grant a new trial, without annexing the condition of paying the costs of the former trial.—And by *Wilmot*, Justice—The circumstances of this case are so peculiarly hard, that the court ought to go as far as, by the rules of law, it can, in granting relief. If the first application had been for leave to bring money into court upon the common rule, without costs, I should have been for giving it; and I see no reason why it should not be now given.

(L) At what Time Money may be brought into Court upon the common Rule.

A Defendant is not so in court, until bail is put in, as to be able to move for leave to bring money into court upon the common rule. 7 Mod. 140. Anon.

The court will in some cases give a defendant leave to withdraw his demurrer, and bring money into court upon the common rule.

The defendant having demurred to the declaration, and assigned for cause the want of pledges, the plaintiff joined in demurrer. The defendant afterwards moved for leave to withdraw his demurrer, and to bring money into court upon the common rule; which was granted. Barnes, 162. Littlehale v. Bosanquet.

Money may be brought into court upon the common rule, at any time before the defendant has pleaded, although the rule for pleading be out. Barnes, 279. Anon. Ld. Ray. 398.

The general rule is, that although a defendant have obtained the common rule for bringing money into court, he cannot bring the money in after he has pleaded.

The common rule for bringing money into court was discharged, because the defendant did not bring in the money before he pleaded. Barnes, 281. Straphon v. Thompson.

A motion being made, for leave to withdraw a plea of tender, and to bring money into court upon the common rule, and plead the general issue; it was refused. And by the court—We never make a rule for bringing money into court, after the defendant has pleaded, without the consent of the plaintiff. Barnes, 349. Salmon v. Aldrich.

But the court will sometimes give leave to withdraw a plea, and bring money into court upon the common rule.

A motion was made for leave to withdraw the general issue, and after bringing money into court upon the common rule to plead the same *de novo*, the defendant's attorney being dead, before leave was moved for, as his client had desired it might be, for bringing in money, and the attorney's clerk having delivered the plea by mistake. Leave was afterwards given. And by the court—The general rule is against giving leave to do this: but in a case like the present, the general rule ought to be dispensed with. Barnes, 344. Usher v. Edmunds.

Since this case, which seems to have been determined upon the particular circumstances thereof, the practice has been, to give leave to withdraw a plea, and bring money into court upon the common rule, although there be no particular circumstance in the case.

The court of King's Bench granted a rule to withdraw the plea of the general issue, in order to give the defendant an opportunity of bringing money into court upon the common rule. Str. 1271. Tarlton v. Wragg.

And a rule of the same kind has been granted in the court of Common Pleas. Barnes, 289. Phillips v. Barker.

Str. 1271. But, whenever such a rule is granted, the court will take care  
 Barnes, 289. that the plaintiff shall not be thereby delayed; and in order to  
 362. prevent this, it is, wherever the case requires it, made a part of  
 the rule, that the defendant shall take short notice of trial.

Barnes, 281. Money cannot be brought into court upon the common rule,  
 Rep. of Pr. after a judgment has been regularly signed.  
 in C. B. 65.

Barnes, 281. After a regular judgment had been set aside, upon the usual  
 Burges v. terms of paying costs, and pleading the general issue, the court  
 Polla- was moved for leave to bring money into court upon the com-  
 mounter. mon rule. No rule was made. And by the court—Leave is never  
 given to bring money into court upon the common rule, after a  
 judgment has been regularly signed.

### (M) Of pleading where Money has been brought into Court upon the common Rule.

**I**T has been holden, that a defendant, who has obtained the  
 common rule for bringing money into court, can only plead  
 the general issue.

Barnes, 339. After money had been brought into court upon the common  
 Buck v. rule, the defendant obtained a rule to plead double, *non assumpsit*  
 Warren. and *non assumpsit infra sex annos*. The plea was afterwards set  
 aside. And by the court—A defendant can in such case only  
 plead the general issue.

But the contrary has been since holden.

Barnes, 286. In an action upon the case, wherein money had been brought  
 Hellier v. into court upon the common rule, leave was given to plead the  
 Hallet. general issue, the statute of limitation, and a set-off.  
 [Note, this was, as to *some* of the counts only; for after payment of money into court, generally, the defendant  
 cannot plead the statute of limitations. Mead v. Wyndham, Bunb. 100.]

Barnes, 287. After an executor had obtained the common rule for bringing  
 Austin v. money into court, leave was given to plead *plene administravit*, to-  
 Ross. gether with the general issue.

It is, in the general, true, that the defendant cannot bring money  
 into court upon the common rule, as to part of the plaintiff's de-  
 mand in one count, and plead as to the residue of the demand.

12 Mod. 95. In an action of trover for a bill of exchange for a hundred  
 Burnan v. pounds, the defendant moved for leave to bring fifty pounds into  
 Shephard. court, and have that sum stricken out of the declaration; and to  
 Comb. 357. plead not guilty as to the residue. No rule was made. And by  
 Holt, Chief Justice—It may happen, that the plaintiff has a good  
 cause of action for part of his demand, and a probable one for the  
 residue; in which case it would be very hard, to strike the former  
 out of the declaration, and put him to try the latter at the peril of  
 costs.

12 Mod 95. In an action of covenant, several breaches were assigned, one of  
 Paulett v. which was the non-payment of rent. The court was moved, that  
 Heatfield. upon

upon bringing ten pounds into court, the breach, as to the non-payment of rent, might be stricken out of the declaration, and that the defendant might plead as to the residue. No rule was made. And by the court—Whenever it appears that the plaintiff has a just cause of action as to one thing, we will not put him to try another, at the peril of costs.

But if there are two or more counts [or breaches] in a declaration, the defendant may have the common rule to bring money into court as to one or more of them, and to plead as to the other or others.

In an action upon the case, wherein there were nine counts, the defendant obtained the common rule to bring money into court upon two of them, and had leave to plead the general issue, the statute of limitation, and a set-off, as to the others. Barnes, 286.  
Hellier v.  
Hallet.

[So, where an action of covenant was brought upon a lease for non-payment of rent, and not repairing, &c, the court made a rule, that upon payment of what should appear to be due for rent, the proceedings, as to that, should be staid; and as to the other breaches, the plaintiff might proceed, as he should think fit. 2 Salk. 596.  
1 Willf. 75.

So, in covenant upon a charter-party, the defendant was allowed to bring money into court, upon two of the breaches only, viz. for freight and demurrage.] Baillie v.  
Cazelet,  
4 Term Rep.  
579.

If a defendant have obtained the common rule for bringing money into court upon one count, he cannot demur to any other count in the declaration; for the design, of permitting money to be brought into court, is to put an end to the cause. Rep. of  
Pract. in  
C. B. 48.  
Thames v.  
Oley.

If the plaintiff, where the common rule for bringing in money upon some counts in a declaration has been made, think proper to accept the money, he is entitled to costs upon all (a) the counts. Barnes, 286.  
Hellier v.  
Hallet.  
not entitled to the costs upon all the counts, but only upon those on which the money has been paid. [(a) He is  
4 Term Rep. 579.]

## (N) The Consequences of bringing Money into Court upon the common Rule.

**W**HENEVER leave is given to bring money into court upon the common rule, part of the rule is, that unless the plaintiff shall accept thereof, together with costs, to the time of bringing it in, in full discharge of the action, the said money to be paid to the plaintiff, and to be stricken out of the declaration; and upon the trial of the issue, the plaintiff shall not be permitted to give any evidence as to the said money.

A plaintiff is in almost (b) all cases entitled to the money brought into court upon the common rule. [(b) Qu.  
Whether the  
plaintiff be  
never recover  
not entitled to it in all cases; for being an acknowledgment on record, the defendant can never recover it back again, though it afterwards appear, that he paid it wrongfully. 2 Term Rep. 645.]

After ten pounds had been brought into court upon the common rule the plaintiff was nonsuited. A question hereupon arose, Whether the plaintiff was entitled to have the money out of court? Salk. 597.  
Elliot v.  
Callow,  
Rep. of Pr  
in C. B. 36  
H h 4

It was holden that he was. And by the court—So much the defendant has by bringing it into court admitted to be due.

Barnes, 284. Upon a motion in arrest of judgment, the judgment was arrested; yet the court ordered that a sum of money, which had been brought into court upon the common rule, should be paid to the plaintiff.

Barnes, 281. But if a suit abate by the death of the plaintiff, the court has not yet gone so far as to order the money, which had been brought into court upon the common rule, to be paid to his executor.

*Ibid.* As the court will not, however, even in such case, order the money which was brought into court to the plaintiff's use, to be paid out again to the defendant, the prudentest way is, for the defendant to consent that, upon an undertaking by the executor of the plaintiff not to bring another action for the same cause, the money may be paid to him: for if a new action be brought by the executor, the defendant must apply to have the money which is in court transferred for payment in this action, and must pay costs therein.

Barnes, 282. Although a plaintiff has proceeded in his suit after the bringing in of money upon the common rule, he may afterwards have a rule to stay his own proceedings, and take the money out of court.

Barnes, 287. The defendant had brought money into court upon the common rule. The plaintiff, refusing to accept thereof, delivered an issue with notice of trial for the next assizes: but he afterwards countermanded the same. In the next term the defendant served him with a rule, to enter the issue upon record. Hereupon a rule was made, that the plaintiff might take the money out of court, with costs to the time of bringing it in.

1 Barn. 98. But, whenever such a rule is made, the plaintiff must pay the defendant his costs subsequent to the time of bringing the money into court; and it is usual to make it part of the rule, that such costs shall be paid out of the money which has been brought in; and if the money in court be not sufficient for this purpose, that the plaintiff shall make good the deficiency.

Rep. of Pr. in C. B. 5. Anon. If money has, in an action against an executor, been brought into court upon the common rule, and the plaintiff is afterwards nonsuited, or there is a verdict against him, the defendant shall have the money out of court again; because, being an executor, he might not know, whether his testator was indebted to the plaintiff or not.

Str. 1027. A defendant, who has brought money into court upon the common rule, is not entitled to have it out of court again, although there be a verdict for him: for he has admitted the sum brought in to be due to the plaintiff, and so much has been stricken out of the declaration.

If a suit abate, after money has been brought into court upon the common rule, by the death of the defendant, his executor is not entitled to have the money out of court again.

Although



Although the plaintiff is entitled to the money which has been brought into court upon the common rule, it is usual for the court, if there be a verdict for the defendant, to order it, provided the sum do not exceed what is due to the defendant for costs, to be paid to him on account thereof.

1 Barn. 199.  
Anon. Rep.  
of Pr. in  
C. B. 54.

A motion was made, upon an affidavit that the defendant was dead, to have ten pounds, which had been brought into court by him upon the common rule, paid out of court to his executor: but it was denied.

Barnes, 279.  
Knapton v.  
Drew.

[Although bringing money into court is an acknowledgment of the right of action to the amount of the sum brought in (*a*); yet beyond that amount it is no acknowledgment (*b*); and therefore if the plaintiff proceed to trial (*c*), otherwise than for the non-payment of costs, and do not prove more to be due to him than the sum brought in, she shall, on (*d*) producing the rule be nonsuited, or have a verdict against him, and pay costs to the defendant (*e*). But, if more appear to be due to him, he shall have a verdict for the overplus, and costs (*f*). Where the plaintiff proceeds further, without going on to trial, he shall have his costs to the time of bringing the money into court; and the defendant shall be allowed his subsequent costs (*g*).

Tidd's Pr.  
415, 416.  
(*a*) 5 Burr.  
2640.  
2 Term  
Rep. 275.  
(*b*) 1 Term  
Rep. 464.  
(*c*) 2 Salk.  
597.  
2 Str. 1027.  
Ca. temp.  
Hardw. 206.  
Say. Rep.  
196, 7.  
2 Burr.  
Jemb. contra.

1121. (*d*) 5 Com. Dig. 20. (*e*) 4 Term Rep. 10. 1 Term Rep. 710.  
(*f*) Ca. temp. Hardw. 260. (*g*) 1 Term Rep. 629. Say. Rep. 196. *contra*.

If, after the defendant has brought money into court, the plaintiff proceed to trial, and a juror be withdrawn by consent, the plaintiff is not entitled to costs up to the time of bringing the money into court.]

Stodhart v.  
Johnson,  
3 Term  
Rep. 657.

## (O) In what Cases a Tender may in the general be made, or Money may be brought into Court upon the common Rule.

**H**ITHERTO tender and bringing money into court upon the common rule have had a distinct consideration: but it may be as well to treat of them, under this and the following head, jointly: because the greater part of the matter, which falls properly under these two heads, is so blended in the books, that it cannot, without some difficulty and much repetition, be separated; and perhaps the separation would not in the least tend to the illustration of either subject.

It is, in general, true, that whenever one person has a right to a certain debt or duty from another, a tender may be made.

This might be illustrated by an infinity of cases; but the reason of the thing, namely, that it should not be in the power of one man to vex another, by suing for a certain debt or duty which the other has offered to satisfy, speaks so strongly, as to make it unnecessary to adduce any.

It will moreover in treating of tender in particular actions appear, that in almost every instance where a tender cannot be made,

made, it is owing to the uncertainty of the debt or duty, that it cannot in such instance be made.

But, although, a tender may be made in every case wherein the debt or duty is certain, it is not necessary to make one in every such case.

Bro. Tend.  
Pl. 22.  
7 Rep. 28.  
Hob. 207.  
12 Mod.  
414.

If the obligation precede the duty, as where a bond is with condition to pay a sum of money, or an annuity, neither of which was before due, a tender must, to save the penalty of the bond, be made: but, if the duty precede the obligation, as, where a bond is with condition to pay a rent-charge, which was before due, no tender is necessary; for it is sufficient, that the party be ready to pay this when it is demanded upon the land.

Leon. 17.  
Fringe v.  
Lewes.  
12 Mod.  
414.

So, if an executor enter into a bond, with condition to perform a will, he is not thereby bound to tender a legacy given by the will; but the legacy remains as it was before, payable upon request.

In almost every action, wherein a tender might, before it was commenced, have been made, money may be brought into court upon the common rule

6 Mod. 29.  
Anon.  
Salk. 596.

It was formerly holden, that money could not be brought into court upon the common rule, in an action wherein an executor or administrator was plaintiff; because neither of these is liable to costs.

Barnes, 279.  
Bryan v.  
Holloway.

Afterwards the practice was, in an action brought by an executor or administrator, to make a rule upon the plaintiff, to shew cause why he should not accept the debt and costs.

Str. 796.  
Crutchfield  
v. Scot.  
[Bunb. 44.  
Knight v.  
Duchess of  
Hamilton,  
S. P.]

But it has since been holden, that money may be brought into court upon the common rule, where an executor or administrator is plaintiff; for that, although the plaintiff cannot be thereby made liable to pay costs, he ought to be prevented from obtaining costs, subsequent to the time of bringing in the money.

The common rule for bringing money into court, may be had in some cases where no tender could have been made.

If a sum of money be given, as a penalty, by a statute, to any person who will sue for the same; an offender against the statute is liable to pay the money to the person who does sue for it: but no tender could have been made in this case: because a tender can never be made after an action is commenced, and it could not be known, until the action was commenced, that the offender would have been liable to pay the money to the person who has brought the action.

Str. 1217.  
Webb qui  
tam v. Poul-  
ter. [2 Bl.  
Rep. 1052. Stock v. Eagle.]

But the court will, after an action is commenced for a sum of money, given as a penalty by a statute, give leave to bring money into court upon the common rule.

(P) Of tendering and bringing Money into Court upon the common Rule in particular Actions.

1. In an Action of *Assumpsit*.

IT is, in the general, true, that money cannot be brought into court upon the common rule in an action of *assumpsit*; because the damages, which may be recovered in such action, are for the most part uncertain.

In an action of *assumpsit* against a master of a ship, for damages sustained by his not delivering some jars of oil safe, and in as good condition as he received them, a motion was made for leave to bring money into court upon the common rule, at the rate of sixpence *per jar*. No rule was made. And by Lord Mansfield, Chief Justice—Wherever, in an action of *assumpsit*, the damages are, as in the present case, uncertain, the court never gives leave to bring money into court upon the common rule.

[But, in an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of twenty pounds, unless they were entered and paid for accordingly, he was allowed to bring the twenty pounds into court.]

It is laid down in one case, that money may be brought into court upon the common rule in an action of *assumpsit* upon a count for a *mutuatus*.

But in a latter case, where an action was brought upon a bill penal, and a count was added for a *mutuatus*, it was holden, that money could not be brought into court, upon the common rule, upon this count.

It was formerly holden, that no tender could be made in an action of *assumpsit* upon a count for a *quantum meruit*, by reason of the uncertainty of the damages which may, on such count, be recovered.

A motion being made for leave to bring money into court upon the common rule, in an action of *assumpsit* wherein there was one count upon an *indebitatus assumpsit*, and another upon a *quantum meruit*, the court gave leave to do it as to the former count, but not as to the latter. And by the court—Who can tell what a man deserves till it be tried?

But it has been since holden, that a tender may be made in an action of *assumpsit* upon a count for a *quantum meruit*; and it follows of course, that money may now be brought into court in an action of *assumpsit* upon a count for a *quantum meruit*.

A tender may be made in all cases in an action of *assumpsit* upon a count for an *indebitatus assumpsit*; because the damages which may be recovered on such count are always certain.

MS. Rep.  
East. 30 G. 2.  
Buckholden  
v. Hampton.

Hutton v.  
Bolton, E.  
22 G. 3.  
Tidd's Pr.  
411.

7 Mod. 141.  
Anon.  
Hil. 1 Ann.

Barn. Pierce  
v. Saunders.

Ld. Raym.  
255. Gyles  
v. Hartis.

12 Mod. 187.  
Smith v.  
Johnson.

Str. 576.  
Johnson v.  
Lancaster.

Salk. 23.  
Hard's case.  
Salk. 597.  
6 Mod. 123.

## 2. In an Action upon the Case.

Money cannot be brought into court upon the common rule in an action upon the case; because the damages, which may be recovered in this action, are uncertain.

Str. 787.  
White v.  
Woodhouse. It has been holden, that money cannot be brought into court upon the common rule, in an action upon the case for immoderately driving a hired chaise.

Str. 966.  
Squire v.  
Archer. In an action upon the case for dilapidations, the court refused to let money be brought in upon the common rule.

By the 11 G. 2. c. 19. § 20. a tender may be made, before the commencement of an action upon the case, for any unlawful act done by a person who has distrained for rent justly due.

By the 17 G. 2. c. 38. § 10. a tender may be made, before the commencement of an action upon the case, for any irregularity in distraining for money justly due for the relief of the poor.

Griffiths v.  
Williams,  
1 Term Rep.  
718. [Although, in an action for general damages, the bringing of money into court is irregular, yet, if the plaintiff takes it out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum brought in.]

## 3. In an Action of Covenant.

1 Vent. 356.  
Anon.  
1 Show. 130. It is, in the general, true, that money cannot be brought into court upon the common rule in an action of covenant; because this action, in general, sounds in damages.

11 Mod. 270.  
Anon.  
Salk. 596. In an action of covenant for not doing repairs, it was holden, that money could not be brought into court upon the common rule, the demand being in such case uncertain.

But, wherever the damages sustained by the breach of covenant assigned are certain, money may be brought into court upon the common rule.

Salk. 596.  
Anon. If the breach assigned in action of covenant be non-payment of rent, money may be brought into court upon the common rule; the demand being in such case certain.

Barn. Wal-  
dough v.  
Houghton. In an action of covenant, the breach assigned was, the not having dressed corn well, and the damages were alleged to be eleven pounds. Upon a motion to bring this sum into court upon the common rule, the counsel for the plaintiff consented thereto; and admitted, that the demand was in this case as certain, as if the action had been for the non-payment of rent.

MS. Rep.  
Hallet v.  
The East-  
India Co.  
Hil. 1 G. 3.  
in K. B.  
2 Bur. 1120.  
S. C. In an action of covenant upon a charter-party, one breach assigned was, the non-payment of money due for freight; another was, the non-payment of money due for demurrage. A rule was made for bringing money into court upon the common rule, as to these two breaches. And by Lord Mansfield, Chief Justice—The sensible distinction in such case is, that, if the sum of money, which ought to be recovered, may be ascertained by computation, leave ought to be given to bring money into court: but where the sum

sum of money cannot be ascertained by computation, but does, in some measure, depend upon the judgment of a jury, it is reasonable that the plaintiff should be at liberty to have such judgment, without being liable to costs, in case it should be against him.

4. In an Action of Debt.

It is, in the general, true, that money cannot be brought into court upon the common rule, in an action of debt.

If an action of debt be brought upon a judgment, the court will not permit money to be brought into court upon the common rule.

6 Mod. 60.  
Burridge v.  
Fortescue,  
7 Mod. 114.

A motion being made, for leave to bring money into court upon the common rule in an action of debt upon articles, it was refused. And by *Holt*, Chief Justice—I never knew this allowed to be done in such case.

7 Mod. 145.  
Anon.

A defendant had obtained the common rule for bringing money into court, in an action of debt for the penalty of a charter-party: but it was afterwards discharged, as being contrary to the course of the court.

Barnes, 285.  
Yeoman v.  
Rofs.

In an action of debt for goods sold, the court refused to let money be brought into court upon the common rule.

Str. 890.  
Leapridge v. Pongillionne.

But in some actions of debt, money may be brought into court upon the common rule.

[There is a distinction between

those actions of debt, wherein the plaintiff cannot recover less than the sum demanded; as, on a record, specialty, or statute, giving a sum certain by way of penalty, Cro. Jac. 128. 498. 629. 3 Mod. 41.; and those actions, wherein the plaintiff may recover less, as, in debt for rent, 5 Mod. 212. or on a simple contract, 1 H. Bl. 249. In the former, the defendant cannot bring money into court, 2 Str. 890. Barnes, 285. though he may move to stay the proceedings, on payment of the whole debt and costs, Ca. temp. Hardw. 173. 3 Burr. 1390.: but in the latter, the defendant has been allowed to bring money into court, 1 Ventr. 356. 2 Salk. 516, 7. because the plaintiff does not recover according to his demand, but according to the verdict of the jury. Tidd's Pr. 410.]

It is usual to allow money to be brought into court upon the common rule, in an action of debt for rent.

Barnes, 280.  
Dixon v.  
Allen. Salk. 596.

In an action of debt, wherein there was only one count, for a penalty of five pounds given by a statute, the court gave leave to bring the five pounds into court upon the common rule.

Str. 1271.  
Webb qui  
tam v.  
Punter.

In a very late case, there was in an action of debt one count for twenty pounds, on account of the defendant's having had four partridges in his custody; and another count for other twenty pounds, on account of his having exposed four partridges to sale. A motion being made to pay twenty pounds into court upon the common rule, leave was given so to do.

MS. Rep.  
East 31 G. 2.  
Walker qui  
tam v.  
Keene.

Money could, even before the statute, have been brought into court upon the common rule, in an action of debt upon a bond for the payment of a less sum; nay, it is said by *Holt*, Chief Justice, that the first instance of giving leave to bring money into court, was in an action of debt upon a bond for the payment of a less sum.

7 Mod. 141.  
Anon.  
Salk. 596.  
6 Mod. 60.

12 Mod.  
598. Coke  
v. Heathcot.

But the court never give leave to bring money into court upon the common rule, in an action of debt upon a bond of indemnity, or a bond for the performance of a collateral agreement.

Salk. 597.  
Anon.

Heretofore the defendant, in an action of debt upon a bond for the payment of a less sum, who had obtained the common rule for bringing money into court, must have brought in the whole penalty of the bond.

This hardship is remedied by the 4 Anne, c. 16. § 13. it being thereby enacted, "That if, pending an action upon a bond, with condition to be void, upon the payment of a less sum, the defendant shall bring into court all the principal money and interest due, and costs, the said money shall be taken to be a full satisfaction of the said bond, and the court shall give judgment to discharge every such defendant of the same."

Wright, Ex-  
ecutor, v.  
Swayne.  
Barnes, 289.

It has been holden, that if an action of debt upon a bond for the payment of a less sum be brought by an executor or administrator, the case is within this statute; the words thereof being general.

Atkins v.  
Taylor,  
Barnes, 285.

An action of debt upon a bond to a sheriff, conditioned for the good behaviour of his bailiff, and, *inter alia*, for paying money collected for the sheriff's use, is not within the statute; because the bond is not for the payment of a less sum.

12 Mod. 598.  
Coke v.  
Heathcot.

For the same reason, if an action of debt be brought upon a bond of indemnity, or upon a bond for the performance of a collateral agreement, money cannot, under the statute, be brought into court.

Str. 515.  
Land v.  
Harris.

A bond having been given to pay a sum of money by instalments, at the rate of five pounds *per annum*, the obligee, after the obligor had failed in making one payment, brought an action upon the bond. Hereupon a motion was made in the court of King's Bench, that, upon bringing into court the five pounds, with costs, the proceedings in the actions might be staid. No rule was made. And by the court—The defendant is not entitled, under the act of the fourth of Anne, to have the proceedings staid, unless the whole money be brought into court; for it never could be intended, that the obligee should be put to the trouble of bringing an action every year.

Str. 814.  
Bridges v.  
Williamson.  
Mayne v.  
Somner, Hil. 4 G. 2.

Since this case, the court of King's Bench has, in two cases, given leave to bring the arrear of money due on a bond to pay by instalments into court, as being a case within the statute.

[See also Bonafous v. Rybot, 3 Burr. 1370. acc.]

Str. 597.  
Darby v.  
Wilkins.  
Lucas v.  
London,  
Mich.  
11 G. 2.

But it has, in two subsequent cases, been holden by the same court, that, as the allowing of the arrear of money due upon a bond to pay by instalments, to be brought into court, can only be done by an equitable construction of the statute, the plaintiff, who ought not to be thereby deprived of any legal advantage, may sign judgment in the action upon the bond, with a stay of execution, until there is a failure in some future payment.

Moss v.  
Hardy,  
Barnes, 283.

The court of Common Pleas did, in a still later case, give leave to bring the arrear of the money due upon a bond to pay by instalments

statements into court, and it does not appear, from the report of the case, that leave was given for the plaintiff to sign judgment in the action upon the bond, as a security for any future payment.

[The defendant, by act of parliament, may bring money into court, in debt, covenant, or other action, on a policy of assurance.]

St. 19 G. 2.  
c. 37.  
3 Burr.  
1773.

### 5. In an Action of Ejectment.

As the only question which can arise in an action of ejectment is, Whether the plaintiff has a right to the possession of the premises thereby demanded? Money cannot be brought into court upon the common rule in this action.

But a rule may, in some cases, be had, that, upon bringing a sum of money into court, the proceedings in an action of ejectment shall be staid.

If an action of ejectment be brought, upon the forfeiture of a lease for non-payment of rent, the lessee, if he will make oath that his lease is not expired, may have a rule that, upon bringing into court the rent which is in arrear, the proceedings shall be staid.

Comb. 299,  
Salk. 597.

By the 7 G. 2. c. 20. § 1. it is enacted, " That where any action of ejectment shall be brought, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any court of equity in that part of *Great Britain* called *England*, for the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments; if the person or persons, having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall become defendant or defendants in such action, shall bring into court all the principal monies, and interest and costs, such money for principal, interest, and costs, to be ascertained by the court where such action shall be depending, or by the proper officer to be by such court appointed for that purpose, the monies so brought into court shall be taken to be a full satisfaction of such mortgage, and the court shall discharge every such mortgagor or defendant of the same."

But by § 3. it is provided, " That this act shall not extend to any case where the person or persons, against whom the redemption shall be prayed, shall by writing under his, her, or their hands, or the hands of his, her, or their attorney, agent, or solicitor, to be delivered, before the money shall be brought into such court of law, to the attorney or solicitor for the other side, insist that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other principal sums, than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case, where the right of redemption to the mortgaged lands and premises in question shall be controverted by different defendants."

6. In

6. In an Action against a Justice of the Peace on the Account of something done in the Execution of his Office.

[See similar provisions in actions against officers of the Excise, 23 G. 3. c. 70. § 30, 31, 32, 33, and Customs, 24 G. 3. Sess. 2. c. 47. § 35.]

By the 24 G. 2. c. 44. § 2. it is enacted, "That it shall be lawful for any justice of the peace, within one calendar month after being served with a notice, that some writ is intended to be sued out against him, or that a copy of some process is intended to be served upon him, for something done in the execution of his office, to tender amends to the party complaining, or to his or her attorney; and in case the same be not accepted, to plead such tender in bar to any action to be brought on such writ or process, together with the plea of not guilty, and any other plea, with the leave of the court; and if, upon issue joined, the jury shall find the amends so tendered sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or discontinue his action, or in case judgment shall be given for such defendant upon a demurrer, such justice shall be entitled to the like costs, as he would have been entitled unto, in case he had pleaded the general issue only."

By the same statute, § 4. it is enacted, "That if the justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action is brought, it shall be lawful for him, with leave of the court, at any time before issue joined, to pay into court such money as he shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given, as in other actions wherein the defendant is allowed to pay money into court."

It is not necessary that the party, who pleads a tender upon this statute, should bring the money into court: but as the other party, who has once refused to accept the amends which has been tendered, would for want of this have no satisfaction for the injury received, the court of King's Bench have taken the following method of preventing this hardship.

MS. Rep.  
Lawrence v.  
Cox, Hil.  
33 G. 2. in  
K. B.

A justice of the peace, upon receiving notice that an action would be commenced against him, had tendered ten guineas. This was not accepted; and the injured party, without having made any demand of the money after the refusal to accept thereof, brought an action. The plaintiff being afterwards desirous of accepting the money which had been tendered, the court of King's Bench made a rule, for the defendant to shew cause, why upon the plaintiff's discontinuing the action, and paying the defendant his costs subsequent to the tender, the defendant should not pay the ten guineas to the plaintiff. And by Lord Mansfield, Chief Justice—It must have been the intention of the legislature, that amends to the party injured should be made as well as tendered. Cause was afterwards shewn against the rule: but it was made absolute.

#### 7. In an Action of Replevin.

It is, in the general, true, that money cannot be brought into court upon the common rule in an action of replevin.

But



But if the defendant, in an action of replevin, avow for rent in arrear, the plaintiff may bring money into court upon the common rule. Salk. 597.  
7 Mod. 141.

In an action of replevin, the defendant avowed the taking of the cattle damage-feasant. The plaintiff in his replication disclaimed title, and pleaded, that his cattle entered into the defendant's ground against his will, and did damage; and that after impounding them, but before the action was brought, he tendered sufficient amends. Upon a demurrer, judgment was given for the defendant. And by the court—The statute of the 21 *Ja. 1.* extends only to actions of trespasss *quare clausum fregit*, and not to actions of replevin, which remain as they were at the common law. Consequently, the tender in this case was not good, because it was not made before the cattle were impounded. Lutw. 1554.  
Allen v. Bayley.  
Freem. 359.  
527.  
5 Rep. 76:

Upon a motion for leave to bring money into court upon the common rule in an action of replevin, it appeared, that after the impounding of the cattle, which had been distrained damage-feasant, but before the action was brought, more money had been tendered by the plaintiff than the damage, by the admission of the defendant, did amount to; and the question was, Whether this case be within the 21 *Ja. 1. c. 16.*? It was holden, that it is not. And by the court—As the leave to bring money into court is by that statute only given in an action of trespasss *quare clausum fregit*, it cannot be extended to any other action. MS. Rep.  
Newson v. Waters,  
Hil. 14 G. 3.  
in C. B.

After the right of distraining cattle, as damage-feasant, has been tried in an action of replevin, the plaintiff, notwithstanding there be judgment for the defendant, may tender the damages; and if the cattle are not thereupon delivered, he may maintain an action of detinue for them. 8 Rep. 147.

### 8. In an Action of Trespasss.

A tender cannot be made, at the common law, in satisfaction of a trespasss. Bro. Tresp.  
pl. 214.

By the 21 *Ja. 1. c. 16. § 5.* it is enacted, “ That in all actions of trespasss *quare clausum fregit*, wherein the defendant or defendants shall disclaim title to the land, in which the trespasss is supposed to be done, and the trespasss be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespasss was by negligence or involuntary, and a tender of sufficient amends before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue.”

In an action of trespasss for breaking the plaintiff's close, and mowing his baulk, the defendant, after disclaiming title, pleaded, that he had a baulk adjoining to the plaintiff's; and that in mowing his own baulk he had involuntarily, and by mistake, mowed some of the grafs growing upon the plaintiff's baulk, intending only to mow the grafs growing upon his own baulk; and that before the issuing of the writ he had tendered to the plaintiff two

shillings in satisfaction; and that this was a sufficient amends. Upon a demurrer to this plea, judgment was for the plaintiff. And by the court—The act in this case appears to have been voluntary, and the intention of the defendant, which could not be known, was not traversable.

Str. 549.  
Bailee v.  
Vivath.

In an action of trespass for taking goods, the defendant pleaded a tender. Upon a demurrer it was holden, that this case is not within the statute of the 21 *Ja. 1. c. 16.*

By the 11 *G. 2. c. 19. § 20.* a tender may be made, before an action of trespass is brought, for any unlawful act done by a person who has distrained for rent justly due.

By the 17 *G. 2. c. 38. § 10.* a tender may be made, before an action of trespass is brought, for any irregularity in distraining for money justly due for the relief of the poor.

Pickering v.  
Truſte,  
7 Term Rep.  
53.

[Under certain circumstances the court will, in an action of trespass, stay the proceedings upon the defendant's undertaking to bring the goods for which the action is brought, into court, or to pay the full value for them, with the costs of the action.]

### 9. In an Action of Trover.

Str. 142.  
Anon.

In an action of trover for money, the money may be brought into court upon the common rule.

12 Mod 397.

But if an action of trover be brought for goods, the court will not allow the value of the goods in money to be brought into court upon the common rule: for if this were suffered to be done, it would be in the power of the defendant to set a value upon the goods of the plaintiff.

Str. 142.  
Anon.

Nor can the goods themselves, for which an action of trover has been commenced, be brought into court upon the common rule.

Str. 822.  
Bowington  
v. Parry.

The court would not give leave to bring a laced head, for which an action of trover had been commenced, into court upon the common rule.

Str. 1171.  
Oblivant v.  
Perineau.

In an action of trover for pictures, the court refused to let them be brought into court upon the common rule. And by the court—This action is not to recover the pictures, but to recover damages to the value thereof; and the pictures may not now be in so good a condition as they were at the time of the conversion.

Although the goods, for the conversion of which an action of trover is brought, cannot be brought into court upon the common rule, the defendant, if the action be in the court of Common Pleas, may in some cases have a rule, that upon bringing the goods into court the proceedings shall be stayed.

Royden v.  
Eatty.  
Bulstons, 284.

A rule was granted by the court of Common Pleas for the plaintiff to shew cause, why, upon bringing into court four new-wrought dimittie bed curtains, and other goods specified in the declaration, the proceedings should not be stayed: but it appearing upon shewing cause, that the curtains had been cut, altered, and scoured, and thereby lessened in their value, the rule was discharged.

charged. And by the court—The making of a rule of this sort absolute is discretionary; and in this case it is not reasonable, to oblige the plaintiff to take his goods again.

If the goods, for the conversion of which an action of trover is brought, are heavy or bulky, the court of Common Pleas will not make a rule for bringing them into court: but will make a rule upon the plaintiff, to shew cause why he should not consent to accept the goods.

Cooke v.  
Ho'gate.  
Barnes, 281.

It is not the practice of the court of King's Bench to make a rule, that upon bringing into court the goods, for the conversion of which an action of trover is brought, the proceedings shall be stayed.

This court did indeed, in one case, a few years ago, make a rule for the plaintiff to shew cause, why the proceedings should not, upon bringing the thing charged to have been converted into court, be stayed.

The book called *Memoirs of a Woman of Pleasure* having been lent by a bookseller for the perusal of some young ladies at a boarding-school, the mistress of the school took it from them, and sent it to the bookseller, with a request that it might not be lent to her scholars again. The book being afterwards found in the possession of one of the young ladies, the mistress took it from her and kept it. An action of trover being thereupon brought, the court of King's Bench made a rule for the plaintiff, to shew cause why, upon bringing the book into court, the proceedings should not be stayed.

Sayer, 80.  
Catling v.  
Bowling.

But in another case, in the same court, wherein a motion was made upon the authority of the last case, that the proceedings in an action of trover might be stayed, upon bringing into court a gold watch and a diamond ring, for the conversion of which it had been commenced, no rule was made. And by *Wright*, Justice (*Lee*, Chief Justice being absent)—It has been said, that in the case of *Catling v. Bowling*, in this court, a rule was made to shew cause why, upon bringing a book into court, the proceeding in an action of trover should not be stayed: but the rule to shew cause in that case, which was made upon the particular circumstances of the case, was contrary to the course of the court, and we never heard any more of that rule.

Sayer, 120.  
Harding v.  
Wilkin.

[However, notwithstanding the disposition supposed to be discovered by the court in the last case, the granting or refusing of motions of this kind is entirely in the discretion of the court, governed by the circumstances of the case immediately before them. Where trover is brought for a specifick chattel of an ascertained quantity and quality, and where the case is unattended with any circumstances that can enhance the damages above the real value, but that the real and ascertained value must be the sole measure of the damages, there, the specifick thing demanded may be brought into court. And this is the more reasonable, as the action of trover comes in the place of the old action of detinue. But, where there is an uncertainty, either as to the quantity or quality of the thing de-

3 Burr.  
1354.

manded, or there is any tort accompanying it, that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there, it shall not be brought in.]

## Tenure.

UNDER the word *tenure* is included every holding of an estate.

But the signification of this word, which is very extensive, is frequently restrained by coupling another word with it.

This is sometimes done by a word which denotes the duration of the estates holden: as if a man hold to himself and his heirs, it is called tenure in fee-simple.

At other times the word *tenure* is coupled with a word pointing out the instrument by which the estate is holden: as if the holding be by copy of court-roll, it is called tenure by copy of court-roll.

At other times the word *tenure* is coupled with a word which shews the service by which the estate is holden: as if a man hold by knight's service, it is called tenure by knight's service.

That kind of tenure, which takes its denomination from the duration of the estate holden, has been treated of under the title *Estate in Fee-simple*, and under other proper titles.

Tenure by copy of court-roll has been treated of under the title *Copyhold*.

At present the design is to treat of tenure by service.

This shall be done under the following heads:

- (A) Of Tenure by Service, in the general.
- (B) By what Service an Estate may be holden.
- (C) How a Service, by which an Estate is holden, may be extinguished.
- (D) Of whom an Estate may be holden, and in what Cases an Alteration may be made in the Service, by which it is holden.
- (E) Of Tenure *in Capite*.
- (F) Of Tenure in Frank-Almoign.
- (G) Of Tenure by Divine Service.

(H) Of

(H) Of Tenure by Knight's Service.

(I) Of Tenure by Eſcuage.

(K) Of Tenure by Grand Serjeantry.

(L) Of Tenure by Petit Serjeantry.

(M) Of Tenure by Caſtle Guard.

(N) Of Tenure by Cornage.

(O) Of Tenure in Burgage.

(P) Of Tenure in Villainage.

(Q) Of Tenure in Socage.

(A) Of Tenure by Service, in the general.

EVERY corporeal eſtate lies in tenure by ſervice; nay every ſuch eſtate, which is in the poſſeſſion of a ſubject, muſt actually be in tenure by ſervice: for by the law of *England* no eſtate can be allodial in the proper ſenſe of this word; but muſt be holden of ſome perſon.

Tenants in fee-ſimple are indeed frequently called, in *Doomſday book*, *allodarii*: but this, which is an inaccurate expreſſion, only means, that ſuch tenants have as large an eſtate as ſubjects can have.

It is, in the general, true, that an incorporeal eſtate holden of a ſubject, does not lie in tenure; for tenure cannot be without ſome ſervice; and to every ſervice, except that which is due by tenure in frank-almoign, diſtreſs is incident: but, as there is not in an incorporeal eſtate any thing upon which the lord to whom the ſervice is due can enter and diſtrain, in caſe it be not performed, it follows, that an incorporeal eſtate does lie in tenure.

A fair does not lie in tenure; becauſe the grantor has no remedy by diſtreſs, for a ſervice reſerved in the grant of the fair.

An advowſon appendant to a manor does not lie in tenure: for as ſuch advowſon is appendant to the whole manor, the grantor cannot enter, and make diſtreſs, upon any one part of the manor for the ſervice reſerved.

But an incorporeal eſtate holden immediately of the crown does lie in tenure; for the king has by his prerogative a power of diſtraining, in any part of his tenant's land, for the ſervices reſerved in the grant of the incorporeal eſtate.

And in ſome caſes an incorporeal eſtate does, although it be holden of a ſubject, lie in tenure.

The veſture or herbage of land lies in tenure; for a diſtreſs may be upon the land, for the ſervice reſerved in the grant of the veſture or herbage.

It ſeems to be the better opinion, that an advowſon in groſs lies in tenure; becauſe the grantor may diſtrain upon the glebe,

1 Inſt. 1. 9.  
23. 47. 93.  
98. 144.  
2 Inſt. 501.

1 Inſt. 1.

1 Inſt. 47.  
98. 142.  
144. Bro.  
Ten. pl. 34.  
pl. 75.

5 Rep. 3.  
Jewel's caſe;

Bro. Ten.  
Pl. 34.  
1 Inſt. 142.  
144.

Bro. Ten.  
pl. 13. pl. 31.  
1 Inſt. 47.

1 Inſt. 47.

Bro. Ten.  
pl. 4.  
1 Inſt. 144.

if any beast of the patron be there, for the service reserved in the grant of the advowson.

1 Rep. 62. A reversion and a remainder are both incorporeal estates: yet  
Capell's case. both lie in tenure: for although the grantor has no remedy for  
1 Inst. 47. the service reserved, during the continuance of the particular  
144. Bro. estate, he may, as soon as this is determined, distrain for the ser-  
Distr. 11. 47. vice, and, if it be a pecuniary one, for the arrear thereof.  
Perk. f. 627.

## (B) By what Service an Estate may be holden.

1 Inst. 142. **I**F a thing which lay in render, and which would have been  
Bro. Ten. profitable to the feoffor, had at the common law been reserved  
Pl. 109. in a feoffment, it would have been a good service.

Bro. Ten. And although no profit, from the thing reserved, would have  
Pl. 50. accrued directly to the feoffor; yet, if from the reservation, bene-  
Pl. 109. fit would have arisen to the publick, the thing reserved would have  
been a good service; for whatever is beneficial to the publick is,  
in some degree, profitable to every person.

Bro. Ten. But, if the reservation in a feoffment had been of a thing bene-  
Pl. 109. ficial only to a stranger, this would not have been a good service:  
because no profit would have accrued therefrom to the feoffor.

The reservation of a thing, which lay in prender, would not, at the common law, have been a good service.

1 Inst. 142. If one man had enfeoffed another of land, reserving to himself  
Perk. f. 702. common for four beasts in the land, this would not have been a  
good service: because the feoffor could not have had the thing re-  
served, but by his own act; and that which a man does for himself  
cannot with propriety be called a service.

No right to a service could, even at the common law, have been acquired after an estate had been granted: for nothing could be due as a service but by reservation; and the person who had once parted with the whole of an estate could not afterwards reserve to himself any thing out of it.

Fitz. N. B. If a man had holden an acre of land of *J. S.* by suit of court at  
211. his manor of *A.*, and *J. S.* who was also seised of the manor of  
Bro. Ten. *B.* had agreed with the tenant, that instead of doing suit of court  
Pl. 65. at his manor of *A.* he should do it at his manor of *B.*, *J. S.* would  
2 Inst. 501. not have thereby acquired a right to suit of court at his manor of  
*B.*, for this would have been an indirect way of reserving a new  
service as to his manor of *B.* which so long as the estate formerly  
granted continued, the lord had no power to do.

Bro. Ten. If land had been holden by a rent of twenty shillings, and the  
Pl. 49. lord had agreed with the tenant to accept a hawk instead of the  
1 Inst. 305, rent, the lord could never have demanded the hawk as a service:  
506. because it was not reserved in the grant of the land.

18 E. 1. Since the statute of *quia emptores terrarum* the ancient services  
ft. 1. c. 1. must be reserved, in every conveyance by which a fee passes, and  
only these can be reserved: for by this statute, after reciting, that  
the purchasers of lands and tenements, of the fees of great men  
and other lords, have heretofore entered into their fees to the  
prejudice

prejudice of the lords, to whom the freehold tenants of such great men and other great lords have sold their lands and tenements, to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands belonging to their fees; it is enacted, "That from henceforth it shall be lawful to every freeman, to sell, at his own pleasure, his lands or tenements, or part of them, so that the feoffee shall hold the same lands or tenements, or part of them, of the chief lord of the fee, by such services and customs as his feoffor held them before."

But by the 1 & 2 Ph. & M. c. 8. § 54. This statute, so far as it prevented the reserving such new services, as could be reserved in the creation of tenure in frank-almoign or tenure by divine service, is repealed.

As the statute of *quia emptores terrarum* was made for the advantage of chief lords, the king may dispense with it, and license his tenant to reserve any new service. No other lord can do this, by reason of the king's interest as lord paramount: but the king and the mesne lord or lords may together dispense with this statute, and grant such a licence to the tenant paravail.

Fitz. N. B.  
211.  
Bro. Ten.  
pl. 65.  
2 Inst. 501.

### (C) How a Service, by which an Estate is holden, may be extinguished.

EVERY lord may extinguish part or the whole of a service by which land is holden, either by a release in fact, or a release in law.

1 Inst. 305,  
306.  
Bro. Ten.  
pl. 71. Perk. f. 71.

There is a material difference as to the releasing of a service, betwixt a release in fact, and a release in law.

If two acres of land be holden by one service, and the lord, by deed, release all his right to the service as to one acre, this is an extinguishment of the service as to both acres.

Perk. f. 71.

But, if two acres of land be holden by one service, and one of them be purchased by the lord, this, although it be a release in law of the service as to that acre, does not extinguish the whole service; but the service, in case it be rent, or any thing which is severable, shall be apportioned.

Perk. f. 71.

If however the service, by which two acres of land are holden, be not severable, as, if it be a horse or suit of court, the whole is as completely extinguished, where one acre is purchased by the lord, as if the lord had, by a release in fact, discharged both acres of the service.

Bro. Suit,  
pl. 1.  
Bro. Ten.  
pl. 104.  
Perk. f. 71.

If one of two acres, which are holden by a service that is not severable, come to the lord by descent, no part of the service, because this acre does not come to him by his own act, but by act of law, is extinguished: but the other acre is still liable to the whole service.

Bro. Ten.  
pl. 104.  
Perk. f. 71.

If two acres be holden by one service, and the lord disseise the tenant of one acre, the whole service is suspended; for although

Perk. f. 71.

one part of a service, which is severable, may be extinguished by a release in law, and the other part may remain, a service can never be suspended as to part, and remain as to other part of the same tenancy.

At the common law, if the fee of an estate came to the crown by gift, purchase, or forfeiture, all the services by which it was holden were extinguished, and it might, afterwards, be granted to be holden by any service.

2 Rep. 52.  
Bro. Ten.  
pl. 9.  
6 Rep. 5.  
2 Roll. Abr.  
514.

But by the 7 E. 4. c. 5. it is enacted, that every estate holden of a common person, which shall come to the hands of the king by reason of an attainder of high treason, and be afterwards granted by the king to any person, shall, from the time of the grant, be holden by the same services as if no attainder had been.

It is, in the general, true, that if a lord become seised in fee of an estate holden of himself, the service by which it was holden is extinguished by the unity of possession.

But, if a tenant enfeoff his lord of the tenancy upon condition, the service is only suspended; for, if the condition be broken, and the tenant enter, it shall be revived: but, if before the entry of the tenant the lord enfeoff a stranger, the service is extinguished; and, although the first feoffor afterwards enter for breach of the condition, it shall never be revived; because the tenancy was, by the enfeoffment of the stranger, discharged of the service.

Pro. Avowr.  
pl. 46.  
Perk. f. 29.  
Perk. f. 89.

(D) Of whom an Estate may be holden, and in what Case an Alteration may be made in the Service, by which it is holden.

EVERY estate which lies in tenure is by the law of *England* holden immediately or mediately of the king who is lord paramount to all other lords.

[Though this was a consequence of the feudal system, yet it is said, that allodial property continued among us till the time of Henry the Second; and is, even yet, to be met with in some of the isles of Scotland. See Watkins's edition of Gilbert's Tenures, note vi. and the following books there referred to, viz. *Mat. Baronia Anglica*, b. 1. c. 2. p. 30. *Stuart's View*, b. 2. c. 2. p. 106. *Dissert.* p. 3. § 4. p. 173. n. (3). *View*, b. 1. c. 2. § 1. n. (4). p. 208, 9. *Kains's Ess. Brit. Antiq. Ess.* 1. p. 19. *Hargr.* n. (1). 10 Co. Litt. 65. a. And see as to its continuance on the Continent, 1 Robins. Cha. 5. § 1. p. 267. &c. 271. n. (H).]

Every other lord, of whom an estate is holden, is, from his situation between the king and the tenant paravail, called mesne lord; yet, as one manor may be holden of another manor, one mesne lord may be lord paramount to another mesne lord.

If lord, mesne, and tenant are, and the mesne release to the tenant, the tenant shall hold of the lord by the same service as the mesne held; for, although the service due from the tenant to the mesne be extinguished by the release, the tenant has, by his own act, put himself into the place of the mesne.

But, where lord, mesne, and tenant are, and the mesnalty is determined by the act of God, as by escheat upon the death of the mesne without heir, the tenant shall hold of the lord by the same

Fitz. N. B.  
135.

2 Inst. 502.  
Bro. Ten.  
pl. 97.  
2 Roll. Abr.  
512.

Bro. Ten.  
pl. 37.  
pl. 97.  
2 Roll. Abr.  
512.



same service as he before held of the mesne: for, although the feignory does, in this case, merge into the mesnalty, which is more advantageous for the lord, because it brings him nearer to the tenancy, the tenant shall not be thereby prejudiced.

So, if there be lord, mesne, and tenant, and the mesnalty be determined by act of law, as by escheat for felony, the tenant shall hold of the lord by the same service as he before held of the mesne. Bro. Ten.  
pl. 91.  
2 Roll. Abr.  
513.

If lord, two mesnes, and tenants are, and the second mesnalty come by act of God, or of law, to the first mesne, the first mesnalty, it being more advantageous for the first mesne, merges into the second; yet the second mesne shall hold of the lord by the same service as the first did. 2 Inst. 502.  
2 Roll. Abr.  
513.

At the common law, a man might have aliened his whole tenancy in fee, to be holden of the lord; but he could not have aliened a part thereof in fee, to be holden of the lord; for, as by this means there would have been a division of the service, the lord could not have distrained in the part so aliened, or the whole thereof, as he might have done before the alienation. 2 Inst. 65.

But a man might, at the common law, have aliened a part of his tenancy in fee, to be holden of himself: for, as the service would still have remained entire, the lord could have distrained in the remaining part, for the whole thereof. 2 Inst. 65.

In consequence of this liberty, many tenants did alien so much of their tenancies, that there was not enough left to answer to the respective lords for the services due to them.

For the sake of putting a stop to this practice, which was prejudicial to the lord of whom the tenancy was holden, it was provided by *Magna Charta*, that no tenant should alien so much of his tenancy in fee, as not to leave sufficient to answer to the lord for the whole service. Magn.  
Chart. c. 32.

As frequent questions arose, after the making of this statute, whether, after an alienation of part, a sufficiency of the tenancy was left to answer to the lord for the whole service, it was by the statute of *quia emptores terrarum* enacted, that, if any tenant shall alien a part of his land or tenement in fee, the alienee shall hold the part so aliened immediately of the chief lord of the fee, and shall be forthwith charged with the service, for so much as pertaineth, or ought to pertain, to the said chief lord for such part, in proportion to the quantity of the whole land or tenement. 18 E. II. 1.  
c. 2.  
2 Inst. 66.

As this statute, although made after the statute *de donis*, is confined to lands and tenements of which the fee is granted, if a gift in tail be made, the donee shall hold of the donor, and not of the chief lord; for, so long as the reversion continues in the donor, the donee must hold of him; and the law will not suffer the donee to hold both of the donor, and of the chief lord. Bro. Ten.  
pl. 21. pl. 37-  
96. 1 Inst.  
505. 2 Roll.  
Abr. 501.

But, if a baron, seised in fee of an inheritance in the right of his feme, make a gift in tail, the donee shall not hold of the baron, but of the lord of whom the feme held; because the baron had nothing, but in right of the feme. 1 Inst. 23.  
2 Inst. 502.

Notwith-

2 Inst. 505.

Notwithstanding the statute of *quia emptores terrarum* speaks only of estates in fee-simple, yet, if a gift is made to *A.* for life, or in tail, with remainder to *B.* in fee, the tenant for life, or in tail, shall hold of the chief lord; for as the whole fee is departed with by the donor, neither of the donees can hold of the donor, and consequently both must hold of the chief lord.

Watkins's  
edition of  
Gilb. Te-  
nures,  
Note XLII.

[If the tenant in tail has the reversion in himself; there, although the two estates continue distinct, yet, as he cannot hold of himself, the tenure of the estate-tail is suspended; and he is tenant to the lord in fee.]

2 Co. 92. b.

Bro. Ten. 84. 107. F. N. B. 143. A. 144. A. Dy. 235. pl. 22. Vin. Abr. tit. Tenure, (H. a.) pl. 12.

2 Roll. 429.

As a man seised of two manors might, before the statute of *quia emptores terrarum*, by a feoffment in fee, so he may now by a gift in tail, convey a parcel of one manor and a parcel of the other, to be holden of himself as one tenancy of the same service; and the service shall, in such case, be regardant to both manors.

### (E) Of Tenure *in Capite*.

1 Inst. 108.  
Bro. Ten.  
pl. 6. pl. 47.

EVERY estate is holden of the person of him of whom the estate is holden, or of some honour or manor of which that person is seised.

1 Inst. 108.  
Bro. Ten.  
pl. 47. pl. 60.  
pl. 65.

Every holding of the person is, to speak with propriety, a tenure *in capite*: but only tenure of the king's person has been by way of eminence so called; for wherever the holding was of the person of a subject, it was called tenure in gross, to distinguish it from tenure of a manor.

Mad. Hist.  
Exch. 432,  
433.

Tenure *in capite* seems not to have been well understood, either by Mr. Selden or Sir Henry Spelman; for both of them, as appears plainly from some passages in their works, were of opinion, that every tenure *in capite* was a tenure by barony.

Mad. Hist.  
Exch. 432,  
433.

It is very true, that about the time of Henry the Second most of the king's tenants *in capite* were real or reputed barons: but this was not owing to their being tenants *in capite*, but to the largeness of the feignories which they held of the king.

1 Inst. 108.  
2 Inst. 7.  
Bro. Ten.  
pl. 46. pl. 94.  
2 Roll. Abr.  
503.

It is also true, that in ancient times every one, who held by barony, was a tenant *in capite*; but the converse of this proposition, that every tenant *in capite* was a tenant by barony, is not true: and upon examination it will be found, that by tenure *in capite* nothing more was meant than a holding of the person of the king; and that, so far from its being confined to a tenure by barony, a man might have holden of the person of the king by knight's service, socage, or any other tenure, as well as by barony.

9 Rep. 123.  
Lowe's case.  
Bro. Ten.  
pl. 3.

At the common law, tenure *in capite* was, in the general, so inseparable from a holding of the person of the king, that if land or tenement was granted by the king, to hold of his person, the grantee, although no service was reserved, would have been tenant *in capite*; because this tenure was most advantageous for the king.

If the king had purchased land or tenement of a subject, and had afterwards granted it, to be holden of his person, without reserving any service, this grant would have created a tenure *in capite*. Bro. Ten. pl. 9. 2 Roll. Abr. 504, 505.

If an honour had been forfeited to the king, and a manor holden thereof had come thereby to him, and the king, after being seised of the manor, had enfeoffed any person of it, to be holden of his person, the feoffee would, although no service was reserved, have been tenant *in capite*. 2 Inst. 64. Bro. Ten. pl. 9. 2 Roll. Abr. 505.

But in some cases a grant, to hold of the person of the king, did not, even at the common law, create a tenure *in capite*.

If an honour had been seised into the king's hands, and a manor holden thereof had escheated to him, as of a common escheat, and the king, after being seised of the manor, had granted it to be holden of his person, the grantee would have held it by the same service as the manor was before holden; because this was not a forfeiture to the king, as king, but an escheat to him, as lord. 2 Inst. 64. Bro. Ten. pl. 9. 2 Roll. Abr. 502.

So, if land or tenement, holden of a mesne lord, had come to the king by forfeiture for high treason, and the king, after being seised thereof, had granted it to *J. S. tenendum de nobis, heredibus et successoribus nostris, et aliis capitalibus dominis feodi illius, per servitia inde debita et de jure consueta*, *J. S.* would not have been tenant *in capite*; for by this grant the tenure of the mesne lord, as well as that of the king, as supreme lord, would have been revived. 6 Rep. 6. Moly'n's case. Bro. Ten. pl. 3. 2 Roll. Abr. 502.

An end was put to many distinctions concerning tenure *in capite*, which prevailed at the common law, by a statute made in the first year of *Edward* the Sixth, it being thereby enacted, "That such honours, castles, manors, lands, tenements, or other hereditaments, which now are, or hereafter shall be holden, of the king, his heirs or successors, [or by any of his subjects by knight's service, socage, or otherwise, as of any of his or their dukedoms, earldoms, baronies, castles, manors, lands, tenements, fees, or seigniories,] which did come to the king, or his noble ancestors, or hereafter shall come to the king, his heirs or successors, by any attainder, conviction, outlawry, or surrender, shall not from henceforth be adjudged, deemed, or construed to be holden *in capite*; any ambiguity, doubt, or question heretofore moved to the contrary notwithstanding." 1 E. 6 c. 4. [Vide Rast. Statutes, 442. b.]

It is said in some books, that, at the common law, every holding of the king, as of an honour, was a tenure *in capite*. 1 Inst. 77. F. N. B. 256. Bro. Liv. pl. 58.

But it seems to be the better opinion, that no grant, to hold of the king as of an honour, did, even at the common law, create a tenure *in capite*; and that *Magna Charta* is not introductive of any new law as to this matter, but declaratory of the common law. 1 Inst. 108. 2 Inst. 64. Bro. Ten. pl. 61. pl. 100. Magna Ch. c. 30.

[But this notion, that a tenure *ut de honore* is not a tenure *in capite* is controverted by Mr. Madox with great cogency of reasoning. Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately and without the interposition of any mesne or intermediate lord; and therefore where an honour or other feignory came into the hands of the crown by escheat or otherwise, its tenants were as much tenants *in chief* to the king, as those who were so by original grant from

from the crown. In proof of this Mr. Madox selects, from ancient records, a great variety of instances between the 8th of Richard the First, and the 20th of Henry the Sixth, in which tenures *ut de honore* are expressly styled tenures *in capite*; and as he adds no instances of a later time than Henry the Eighth and Queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured that the error he complains of originated soon after the time of Henry the Sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of tenures *in capite* was to distinguish those estates which were held of the king by a tenure originally created by the king, from those held of him by a tenure commencing by the subinfeudation of a subject, between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency, and more correctness, by denominating tenures of the first sort tenures *ut de coronâ*, and those of the second, tenures *ut de honore*. The influence of this mistaken notion of tenure *in capite* is very evident, as well throughout the statute of Charles the Second for taking away the oppressive fruits of knight's service and tenure *in capite*, as in those grants from the crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. Hargr. Co. Litt. 108. a. note (3).

Bro. Ten.  
pl. 1.

It is indeed true in fact, that divers lands and tenements were heretofore holden of the king *in capite*, as of certain honours, and particularly as of the honour of *Lancaster*: but this is easily to be accounted for.

2 Roll. Abr.  
503.

As some honours, and particularly that of *Lancaster*, had heretofore *jura regalia* annexed to them, the person seized of such an honour, being a kind of petty king, might very well have created a tenure *in capite*; and if lands or tenements were once holden of such an honour *in capite*, they would, if the honour came afterwards into the hands of the king, be holden of him *in capite*, as of that honour.

2 Inst. 501.  
2 Roll. Abr.  
504.  
Dav. 59.

Every tenure *in capite* must originally have been created by a king, or by a person possessed of *jura regalia*; for no tenure, which was originally created by a subject, could afterwards become a tenure *in capite*.

2 Roll. Abr.  
504.

If a prince of the blood had granted land or tenement to be holden of his person, this, although he afterwards succeeded to the crown, would not have become a tenure *in capite*.

1 Inst. 108.  
2 Roll. Abr.  
504.  
Dav. 59.

If a tenant had holden of the person of the mesne lord, and the seigniorship of the mesne lord had been forfeited to the king for high treason, the tenure, although the holding would from thenceforth have been of the person of the king, would not have become a tenure *in capite*.

A tenant *in capite*, besides being liable to the services and fruits of the particular tenure by which he held, was moreover liable, on the account of his tenure *in capite*, to a fine for alienation, and to primer seisin.

[See Mad.  
Baron. Angl.  
238, 239.  
where the  
learned au-  
thor observes

But by the 12 Car. 2. c. 24. § 1. tenure *in capite* was changed into tenure in common socage, and all persons, who before held *in capite*, were discharged of a fine for alienation, and of primer seisin.

on the inaccuracy of language in the 12 Car. 2. about tenure *in capite*. The title of the act expresses, that it was made for taking away tenure *in capite*; and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents; which would have assimilated it to *free and common socage*, without the appearance of attempting to annihilate the indelible distinction between holding *immediately* of the king, and holding of him through the *medium* of other lords. Hargr. Co. Litt. 108. a. note (5).]

(F) Of Tenure in Frank-Almoign.

THE services, by which estates may be holden, are sometimes spiritual, at other times temporal.

Tenures by spiritual services are two; tenure in frank-almoign, and tenure by divine service.

No person, except an ecclesiastick, can hold by either of these tenures.

Tenure in frank-almoign is where an ecclesiastick holdeth land of a lord, without any service being annexed to the tenure. 1 Inst. 93, 94.

As the divine service, which ought of right to be performed, is never ascertained by the deed creating a tenure in frank-almoign, no distress can be made, although it be not performed. But, if the divine service, which of right ought to be performed, be not performed, the ordinary or visitor may punish the tenant for the default. 1 Inst. 96, 97.

An ecclesiastick, who holds in frank-almoign, is bound, of right, to make orisons, to say prayers or masses, or to perform other divine service, for the soul of the grantor, and for the souls of such heirs of the grantor as are dead, and for the prosperity and good life of such heirs of the grantor as are living. 1 Inst. 93, 95.

As the manner of celebrating divine service has been altered by divers statutes, it is sufficient, if a tenant in frank-almoign perform such divine service, as he may now lawfully perform. Hawk. Abr. Co. Inst. 146.

As no land or tenement can be holden in frank-almoign, except of the original grantor and his heirs, a stop was put to the creation of this tenure by the statute of *quia emptores terrarum*: it being thereby enacted, that the grantee of an estate in fee, in any land or tenement, shall hold the same of the chief lord of the fee, by such services as the grantor before held. 1 Inst. 99. 2 Inst. 502. 13 E. 1. ft. 1.

But by the 1 & 2 of Ph. & M. c. 8. § 54. a licence was given to create a tenure in frank-almoign.

A grant to hold in frank-almoign does so entirely exclude all temporal services, that fealty, which is incident to every other tenure, is not incident to that in frank-almoign. 1 Inst. 93, 95.

But, if a tenant in frank-almoign alien his land or tenement in fee, to be holden of the lord by the same services as he held, the alienee, although he be an ecclesiastick, shall hold it by fealty: for he cannot hold in frank-almoign, because he does not hold of the original grantor or his heirs; and, as every tenant, except tenant in frank-almoign, must hold by some service, the law creates a tenure by fealty; because this tenure, fealty being the least service which can be done, is nearest to the freedom of the former tenure. 1 Inst. 98, 99. 2 Inst. 502.

A tenant in frank-almoign is not only exempted from all temporal services, but the lord, of whom he holds, is likewise bound to acquit him of every service and fruit of tenure, which any lord paramount may demand from the land or tenement holden by this tenure; and, if the lord, of whom the tenant in frank-almoign holds, 1 Inst. 99, 100.

holds, do not acquit him of every such service and fruit, but suffer a distress to be made for the same, he may have a writ of mesne against the lord, and recover damages.

[*Qu.* the necessity of this saving clause in the act, how the provisions of it could have extended to this species of tenure? note.]

By the 12 *Car.* 2. c. 24. § 7. it is provided, that tenure in frank-almoign shall not be thereby taken away, nor be subject to any greater or other services, than it was before subject to.

How the provisions of it could have extended to this species of tenure? Hargr. Co. Litt. 100. b.

### (G) Of Tenure by Divine Service.

TENURE by divine service is, in many respects, so similar to tenure in frank-almoign, that, instead of repeating what was said under the last head, it will be sufficient to point out the difference betwixt the two tenures.

1 Inst. 96, 97.

The divine service to be performed by a tenant by divine service is always ascertained in the deed creating the tenure, as that certain prayers shall be said upon every *Friday* in the year; which is never done in the deed creating a tenure in frank-almoign.

1 Inst. 96.

The consequence is, that the lord may distrain, if the divine service be not performed; for wherever a service due by tenure is certain, a distress may be made, if it be not performed.

1 Inst. 97.

Another difference is, that a tenant by divine service is liable to fealty, fealty being incident to every service, for the neglect of which a distress may be made.

[Such a provision in either case seems to be unnecessary.]

It is not provided by the 12 *Car.* 2. c. 24. as is done in the case of tenure in frank-almoign, that tenure by divine service shall not be taken away; but this tenure is not thereby expressly taken away.

### (H) Of Tenure by Knight's Service.

TENURES by temporal services were heretofore very numerous; for before the statute of *quia emptores terrarum*, a reservation of any service, which was profitable to the grantor, would have created a tenure by that service.

The tenures by temporal services which had acquired distinct names, were tenure by knight's service, tenure by escuage, tenure by grand serjeantry, tenure by petit serjeantry, tenure by castle guard, tenure by cornage, tenure in burgage, tenure in villainage, and tenure in focage.

Some of these tenures are now taken away; others of them are changed into tenure in focage: but, as frequent mention is made of these tenures in the books, it cannot be amiss to give a short account of every one of them.

1 Inst. 74.

Tenure by knight's service was the holding of an estate by some corporal service, to be performed for the defence of the realm.

It will follow from this definition, that divers tenures, as tenure by escuage and some others, were in reality, notwithstanding they have, from the specialty of the services to be performed, acquired other names, tenures by knight's service.

And indeed every corporal service, which a tenant was bound to perform in war, was, although the service itself was not of a military kind, knight's service.

Sir *Richard Rockesley* was bound by tenure to be *vantarius regis*, that is, the king's fore-footman, when he went into *Gascony* to make war, until he had worn out a pair of shoes which cost four pence. This service, as it was to be performed when the king went into *Gascony* to make war, was holden to be knight's service. 1 Inst. 69.

Knight's service was called *chivalry*; because the service was, for the most part, to be performed on horseback. 1 Inst. 74, 75.

It was also called *servitium forinfecum*; because a tenant was liable to this, over and above all other services which were due to his lord. 1 Inst. 69. 74.

It has been also called *servitium regale*, because it was ultimately due only to the king; for no lord, although his tenant held of him by knight's service, could compel the performance thereof, unless the lord was himself with the king's army in actual service, or had compounded with the king for his own service. 1 Inst. 74, 75.

This service was, in many grants, expressly reserved; and where this was not done, as it was instituted for the defence of the realm, every intendment was made to increase it as much as possible.

Wherever land or tenement was granted, and there was not, in the grant, such a reservation as did create a tenure in socage, it was constantly holden, that such land or tenement should be holden by knight's service. 9 Rep. 123. Bro. Ten. pl. 3. pl. 7. 1 Inst. 85, 86.

Every tenant liable to this service, who held so much land as amounted to a knight's fee, was, upon being summoned, bound to come on horseback, or to send a sufficient deputy, well arrayed, to any place within the realm, which was appointed by the king; and every tenant, liable to this service, who held less than a knight's fee, was bound to contribute, in proportion to the estate by him holden, to the expence of a horseman. 1 Inst. 68, 69. 70. 74, 75. 2 Roll. Abr. 511.

The opinions are different, as to the quantity of land which did amount to a knight's fee: but the better opinion seems to be, that this did not depend upon the quantity, but upon the value of the land; for that any quantity, of the value of twenty pounds a year, did amount to a knight's fee. 1 Inst. 69.

Knight's service being instituted for the defence of the realm, an heir was held to be incapable of performing it before he was twenty-one years of age; and, that he might, during his younger years, be taught deeds of chivalry, and virtuous and worthy sciences, the lord was, during his minority, to have the custody of the heir. 1 Inst. 75.

Tenants by knight's services were, in ancient times, entitled to divers privileges and exemptions, for the sake of encouraging them, to be the better prepared, with horses and arms, for the defence of the king and realm: but these were lost many years before tenure by knight's service was taken away. 1 Inst. 75.

Besides

Besides the military service due from a tenant by knight's service, he was also liable to the services of homage and fealty.

The fruits, to which this tenure was liable, were ward, marriage, aid for making the lord's eldest son a knight, aid for the marriage of the lord's eldest daughter, and relief.

By the 12 *Car.* 2. c. 24. § 1. tenure by knight's service is changed into tenure in socage.

By the same statute, § 2. the socage tenure, into which tenure by knight's service is changed, is discharged of homage, ward, marriage, aid for making the lord's eldest son a knight, and aid for the marriage of the lord's eldest daughter.

And by the same statute, § 5. it is enacted, that the new tenure in socage should be only liable to such relief, as tenure in socage was before liable to.

### (I) Of Tenure by Escuage.

**I**F a man were, by tenure, bound to perform knight's service in a voyage royal, this was tenure by escuage.

1 *Inst.* 69.  
82, 83. 106.  
108. Every tenant by escuage was also tenant by knight's service : but many tenants by knight's service were not liable to escuage ; for escuage was never due but by special reservation.

1 *Inst.* 67.  
[24. Where  
there escuage,  
where  
knight's  
service was  
reserved generally, could be claimed in all foreign expeditions, whether it was confined to expeditions into particular countries? Hargr. Co. Litt. 74. a. note (1).]

As every going of the king into *Scotland*, or into any other place out of *England*, was called a voyage royal, there were, of course, other voyages royal as well as for war : but escuage was only due in a voyage royal for war.

1 *Inst.* 68.  
2 *Roll. Abr.*  
508. And this service was only due in such voyage royal for war, as was undertaken for the suppression of a rebellion, or for the defence of the realm ; for if the design of the voyage royal were to make a new conquest, escuage was not due.

1 *Inst.* 69.  
72.  
*Fitz. N. B.*  
83.  
2 *Roll. Abr.*  
510. Whenever the king, either in person or by his lieutenant, undertook a voyage royal in which escuage was due, every tenant of a whole knight's fee, who was liable to this service, was bound to be with the king's army, or to send some able man to be there in his room, well arrayed, for the space of forty days, or to compound with the king for such service ; and if he held more or less than a whole knight's fee, he was bound to be with the king's army, in person, or by deputy, for a longer or shorter space of time than forty days, in proportion to what he held, or to compound for such service.

1 *Inst.* 71. The time of the service in a voyage royal did not commence, until the king had entered into the foreign nation : for it could not till then be performed.

1 *Inst.* 67. But every tenant by escuage was not, unless he held immediately of the king, obliged to serve in every voyage royal where escuage was due.



If two mesne lords and tenant paravail all held by this service, neither the second mesne, nor the tenant paravail, was bound to perform it, unless the first mesne did perform it to the king: but, if the first mesne did perform it to the king, the second was bound by his tenure of the first to perform it to him; and in like manner, if the second did perform it to the first mesne, the tenant paravail was also bound to perform it to the second mesne.

1 Inst. 69,  
70. Fitz.  
N. B. 84.  
2 Roll. Abr.  
510.

Although, however, neither the second mesne, nor the tenant paravail, was bound to serve in a voyage royal, unless the first mesne did serve in the voyage; yet, if either of these did serve in the voyage, for so long time as the first mesne ought to have served, this would have excused the default of the first mesne; for only one escuage was due to the king for the tenancy.

1 Inst. 69,  
70.  
Fitz. N. B.  
84.

As soon as the king's army was returned from a voyage royal, every one of his tenants by escuage, who had not performed the service, nor compounded with the king for it, was liable to pay a sum of money for his default.

1 Inst. 72.  
Fitz. N. B.  
83.  
2 Roll. Abr.  
508.

And in like manner every mesne lord, who held of a superior lord by escuage, and every tenant paravail who held by escuage, was liable to pay a sum of money to the lord of whom he held, for his default in not performing the service, or compounding for it: but, if such superior lord had himself made default, he was not entitled to receive any thing, for the default of the mesne lord.

1 Inst. 72,  
73.  
Fitz. N. B.  
83.

The sum to be paid by tenants by escuage, who had made default, was always ascertained by parliament: for, as it concerned a great number of persons, the king could not ascertain it by his own authority.

1 Inst. 72,  
73.  
Fitz. N. B.  
83.

The manner of ascertaining the sum, to be paid in such case, was at the rate of a sum certain for a knight's fee, and of a proportionate sum for a greater or less quantity of land than a knight's fee.

1 Inst. 72.  
Fitz. N. B.  
83.

By the 12 Car. 2. c. 24. § 2. tenure by escuage underwent the same changes, as tenure by knight's service did.

## (K) Of Tenure by Grand Serjeantry.

**I**F a man be by tenure bound, to perform a military service to the person of the king, as to carry his banner or his lance, this is tenure by grand serjeantry.

1 Inst. 105,  
106, 107.

The service due by this tenure was called grand serjeantry, or the great service; because, on account of the excellency of the person to whom it was to be performed, it was a greater and more worthy service: for if the same service were to have been performed to the person of a mesne lord, it would have been only knight's service.

1 Inst. 105,  
106, 107.

Tenure by grand serjeantry was not, however, confined to the holding by a military service to be performed to the person of the king.

1 Inst. 106.

- 1 Inst. 105. For if a man were by tenure bound to execute the office of marshal, high constable, high steward, or great Chamberlain of *England*, this was tenure by grand serjeantry.
- 1 Inst. 106. It was also tenure by grand serjeantry, if a man were by tenure bound to execute an office which concerned the receipt of the king's treasure, or the administration of justice.
- 1 Inst. 106. It was also tenure by grand serjeantry, if a man were by tenure bound to perform any service to the person of the king at his coronation, as to carry the sword or cup.
- 1 Inst. 105. If the service due by this tenure were of a military kind, it could never be performed by deputy.
- 1 Inst. 107. If the service due by this tenure were to be performed in time of peace, and the man, who by tenure ought to do the same, were not of sufficient dignity for the performance thereof in person, he was allowed to make some person of sufficient dignity his deputy.
- 1 Inst. 107. But, if a woman, or an infant, became seised of any land or tenement, to which the performance of a service due by this tenure in the time of peace was annexed, neither of these could make a deputy: but a proper person, both of these being incapable thereof, was appointed by the king to perform it.
- 1 Inst. 105.  
107. Although every tenant by grand serjeantry was likewise tenant by knight's service; yet every such tenant was exempted from the aid for making the lord's eldest son a knight, and likewise from the aid for the marriage of the lord's eldest daughter, to both which other tenants by knight's service were liable.
- [*See Hargr. Co. Litt.*  
108. note (1).] By the 12 *Car. 2. c. 24. § 1.* tenure by grand serjeantry is changed into tenure in socage.

But by the same statute, § 7. it is provided, that no honorary service, which was before due by this tenure; should be taken away.

### (L) Of Tenure by Petit Serjeantry.

- 1 Inst. 108. IF a man be, by tenure, bound to pay yearly to the king a bow, an arrow, or any other instrument of war, this is tenure by petit serjeantry.
- 1 Inst. 108. A tenant by petit serjeantry was only liable to fealty, and the payment of the thing due.
- 1 Inst. 108. This tenure, notwithstanding its being called by another name, is a species of tenure in socage.

### (M) Of Tenure by Castle Guard.

- 1 Inst. 82,  
83. IF a man were, by tenure, bound, upon reasonable notice given to him that an enemy was coming, to defend a tower, or any certain part of a castle, belonging to his lord, or to pay a certain rent in lieu of such service, this was tenure by castle guard.

If

If the tenant had not the alternative of paying a certain rent in lieu of this service, but was obliged to perform it in person, or by deputy, this tenure was a species of tenure by knight's service. 1 Inst. 87.

And it continued to be a species of tenure by knight's service, although a sum of money in gross was in lieu of the service voluntarily paid by the tenant, and received by the lord. 1 Inst. 87,  
[See Mr.  
Hargrave's  
note upon  
this passage.]

Wherever a certain rent was to be paid to the lord in lieu of the service, this tenure was a species of tenure in focage. 1 Inst. 87.

If a tenant by castle guard were at any time called out to perform knight's service in the king's army, he was, for so long time as he served in the king's army, excused from the service of castle guard. Magn.  
Chart. c. 20.  
2 Inst. 34.

The service due by this tenure was not discharged, although the castle to which it appertained was entirely demolished, the tenant being, in such case, only excused from the service until the castle was rebuilt. 1 Inst. 83.

But, if lord and tenant by castle guard were, and the lord had granted the feignory whilst the castle was demolished, the service due by this tenure would have been discharged; because the grantee had not the castle: nor could it have been revived, if the grantee had built a new castle. 4 Rep. 85.  
Bro. Ten.  
pl. 11.  
1 Inst. 83.

Wherever this tenure was a species of tenure by knight's service, it is by the 12 Car. 2. c. 24. § 1. changed into tenure in focage.

And by the same statute, § 2. tenants by castle guard, who were also tenants by knight's service, are discharged of such services and fruits of tenure, as other tenants by knight's service are discharged of.

## (N) Of Tenure by Cornage.

**I**F a man were, by tenure, bound to wind a horn, for the sake of alarming the country, as often as he heard that an enemy was come, or about to come, into *England*, this was tenure by cornage. 1 Inst. 106.

This tenure, if the tenant held immediately of the king, was a species of tenure by grand serjeantry: but, if he held of a common person, it was a species of tenure by knight's service. 1 Inst. 106.

By the 12 Car. 2. c. 24. § 1. this tenure is changed into tenure in focage.

And by the same statute, § 2. such tenants by cornage, as were likewise tenants by grand serjeantry, are discharged of such services and fruits of tenure, as other tenants by grand serjeantry are discharged of; and such tenants by cornage, as were likewise tenants by knight's service, are discharged of such services and fruits of tenure, as other tenants by knight's service are discharged of.

## (O) Of Tenure in Burgage.

- 1 Inst. 109. **I**F a man hold an estate, which lies in a borough, of the king or other lord of the borough, by a certain yearly rent, this is tenure in burgage.
- 1 Inst. 109. Tenure in burgage was only liable to fealty, and the payment of the yearly rent.
- 1 Inst. 109. This tenure, notwithstanding its being called by another name, is a species of tenure in socage.

## (P) Of Tenure in Villainage.

- I**F a man were by tenure bound to perform a base service for his lord, this was tenure in villainage.
- Tenure in villainage was of two kinds: tenure in villainage, and tenure in pure villainage.
- 1 Inst. 116. In the former of these, the service to be performed, although base, was certain, as to carry the dung of the lord, and spread it upon his land.
- 1 Inst. 116. In the latter, the service, which depended altogether upon the will of the lord, was so uncertain, that the tenant could never tell at night, what service he was to perform the next morning.
- 1 Inst. 116. Only a villain could be a tenant in pure villainage: but a free-man might be a tenant in villainage.

## (Q) Of Tenure in Socage.

- I**F a man be by tenure bound to pay any certain thing to the lord, this is tenure in socage.
- 1 Inst. 86. Tenure by socage is so called from *soca*, a soke or plough, because the service reserved, at the first institution of this tenure, was to be performed with a plough.
- 1 Inst. 86. In ancient times every tenant in socage was bound, by a reservation in his grant, to serve a certain number of days in every year, in ploughing and sowing the demesne lands of his lord.
- 1 Inst. 86. Afterwards the service was, by agreement between the lord and tenant, changed into a certain payment: but the name of tenure in socage was still retained.
- 1 Inst. 86,  
87. 2 Roll.  
Abr. 502. In still later times every tenure, by which a certain thing was to be paid to the lord, was, for the sake of distinguishing it from tenure by knight's service, called tenure in socage, notwithstanding there was no reservation in the grant of the service of the plough.
- 1 Inst. 86. If the reservation in the grant were of a rose, a pair of spurs, or a rent, every such reservation made a tenure in socage.
- 1 Inst. 108. If a man were by tenure bound to pay annually to the king a bow, an arrow, or any other instrument of war, this, notwithstanding its being tenure by petit serjeantry, as the payment was to be of a thing certain, was a species of tenure in socage.

If a tenant by escuage was, as often as escuage was assessed by parliament, to pay a sum certain, this was a tenure in focage; for, although the money was not to be paid at a time certain, a sum certain was to be paid. 1 Inst. 87.  
Bro. Tcn.  
Pl. 29.

Heretofore an inheritance might have been holden by tenure in focage *in capite*, as well as by tenure in focage.

But by the 12 Car. 2. c. 24. tenure in focage *in capite*, is changed into tenure in focage.

Tenure in focage is liable to no other services than fealty, and the payment of the thing due to the lord.

Tithes. *Vide* Tythes.

## Treason.

**T**HE word treason is derived from the *French* word *trahir*, which signifies to betray.

There are two sorts of treason, high treason and petit treason.

High treason is an offence against that allegiance which is due to the king from every man who lives under his protection.

High treason is so called, by reason of the greatness of the personage against whom it is committed.

High treason, it being an offence of the most dangerous and fatal consequences to society, has, in order to deter men from being guilty thereof, at all times been punished by the law of *England* with the utmost severity. It has for the same reason been more strictly guarded against than any other offence. To every other felony an actual commission of the felony is necessary: but an intention to commit high treason is, in some cases, equivalent to the actual commission thereof.

Petit treason consists in the murder of a person, by one who was under a peculiar obligation to preserve and defend the life of the person murdered.

This offence, it being of very dangerous example, has always been punished, by the law of *England*, with more severity than any other murder.

Some things, which relate to the offence of high treason, have been already treated of; as commitment for high treason, under the title *Commitment*; forfeiture and corruption of blood, for high treason, under the title *Forfeiture*.

The remainder of what appertains to this Title shall be ranged in the following order:

(A) Who may be guilty of High Treason.

(B) Against whom High Treason may be committed.

K k 3

(C) Of

- (C) Of High Treason in the general.
- (D) Of compassing or imagining the Death of certain Personages.
- (E) Of violating certain Personages.
- (F) Of levying War against the King.
- (G) Of adhering to the King's Enemies.
- (H) Of counterfeiting the Great Seal, Privy Seal, Privy Signet, or Sign Manual.
- (I) Of counterfeiting or diminishing the Money current.
- (K) Of bringing counterfeit Money into the Realm.
- (L) Of slaying certain Officers.
- (M) Of extolling or maintaining the Power of the See of *Rome*.
- (N) Of refusing a second Time to take the Oath of Supremacy.
- (O) Of putting a Popish Bull in Ure.
- (P) Of reconciling any Person, or being reconciled, to the See of *Rome*.
- (Q) Of receiving Popish Orders or Education.
- (R) Of denying the Power of Parliament to limit the Succession of the Crown.
- (S) Of affirming that a Person, not in the Succession as by Law established, has a Right to the Crown.
- (T) Of endeavouring to hinder the Person, next in the Succession as by Law established, from succeeding to the Crown.
- (U) Of corresponding with the Pretender or one of his Sons.
- (W) Of corresponding, or treating, with a Rebel or Enemy.
- (X) Of Petit Treason in the general.
- (Y) Of slaying a Husband by his Wife.
- (Z) Of slaying a Master by his Servant.

(A<sub>2</sub>) Of

- (Aa) Of slaying a Prelate by an Ecclesiastick, who owes Obedience to the Prelate.
- (Bb) Of the Indictment of Treason.
- (Cc) Of the Trial of Treason.
- (Dd) Of the Evidence of Treason.
- (Ee) Of the Judgment of Treason.

## (A) Who may be guilty of High Treason.

EVERY subject, who is of the age of discretion, may be guilty of high treason. 3 Inst. 4.  
1 Hawk.  
P. C. c. 1. c. 17. § 4.

The duty of allegiance to the king is so inseparable from a natural-born subject, that, notwithstanding all he can do to renounce his allegiance, or to transfer it to a foreign prince, whatever would be high treason in another person, is so in him. 1 Inst. 129.  
1 Hawk.  
P. C. c. 17.

If a feme-covert commit high treason by the command of her husband, the command does not excuse her, as it does in the case of some other felonies. Bac. Max.  
56, 57.

In ancient times, if a madman had been guilty of an attempt upon the life of the king, it would have been high treason. 3 Inst. 6.  
4 Rep. 124.

But, since the statute of the twenty-fifth year of the reign of Edward the Third, the words of which are, "When a man doth compass or imagine the death of our lord the king," it has been holden, that a person not *compos mentis* is incapable of *compassing or imagining*; and, consequently, that such person cannot be guilty of that species of high treason which consists in *compassing or imagining* the death of the king. 3 Inst. 6.  
1 Hawk.  
P. C. c. 17.  
§ 8.

By the 33 H. 8. c. 20. § 1. it was enacted, "That if any person shall commit high treason when he is of good and perfect memory, and after accusation or confession thereof shall fall to madness, the treason done by such person shall be tried in his absence; and that the offender shall, if found guilty, suffer such pains and forfeitures, as if he had been of good and perfect memory, and had been personally arraigned."

And by § 2. it was enacted, "That if any person shall be attainted of high treason, and afterwards fall into madness, he shall, notwithstanding such madness, have and suffer execution."

This cruel law, as it was highly reasonable it should, was soon repealed; for the design of all punishment is example, *ut pœna ad paucos, metus ad omnes perveniat*: but, when a madman is executed, it is a miserable spectacle as well as an instance of inhumanity and cruelty, and the execution of such a man can never be an example to others. 3 Inst. 4. 6.

The husband of a queen regnant may be guilty of high treason against his wife; because such a queen is, in the eye of the law, a distinct person, to divers purposes, from her husband. 3 Inst. 3.

- 1 Inst. 8. And for the same reason a queen consort may commit high treason against her husband.
- 3 Inst. 11. An alien, who comes into the kingdom in an hostile manner,  
7 Rep. 6. is not thereby guilty of high treason, because he owes no alle-  
1 Ld. Raym. 1. giance to the king.  
Salk. 632.
- 7 Rep. 6. But an alien, who came at first peaceably into the kingdom, and  
Calvin's case. has lived therein some time, may commit high treason: for, as  
3 Inst. 5. he has enjoyed the protection of the king, a local allegiance is in  
Hob. 271. return due from him.  
1 Ld. Raym. 1.  
Salk. 632.
- 1 Hawk. It seems to be the better opinion, that no ambassador from a  
P. C. c. 17. foreign prince, nor any one of the attendants of such ambassador,  
Folst. 187. can be guilty of high treason; unless he make an attempt upon  
the life of the king.

## (B) Against whom High Treason may be committed.

- 3 Inst. 7. **H**IGH treason may be committed against the person in actual  
H. P. C. 12. possession of the crown, although such person be only king  
1 Hawk. or queen *de facto*, and not *de jure*; for as the lives and properties  
P. C. c. 17. of the people are protected by such king or queen, during his  
§ 11. or her administration of the laws, allegiance is in return due for  
this protection.
- By the 11 H. 7. c. 1. it is enacted, "That no person who  
" attends upon the king for the time being, to do him true and  
" faithful service of allegiance, or is in other places by his com-  
" mandment in his wars, within this land, or without, shall, for  
" the said deed, be convicted of high treason."
- 3 Inst. 7. And it has been holden, that, if high treason have been com-  
Bro. Treas. mitted against a king *de facto*, and the king *de jure* afterwards  
pl. 10. come to the crown, the offence is still punishable as high trea-  
H. P. C. 12. son.  
1 Hawk.  
P. C. c. 17. § 12.
- 3 Inst. 7. It is, in the general, true, that high treason cannot be committed  
H. P. C. 12. against the person who has a right to the crown, so long as a king  
1 H. H. *de facto* is in the actual possession thereof; because allegiance is  
P. C. 101. only due to the latter.  
1 Hawk.  
P. C. c. 17. § 16.
- Kel. 15. It was indeed resolved by the judges, after the restoration of  
The case of King *Charles* the Second, that all the acts done to prevent him  
the Regi- from acquiring the actual possession of the crown were high trea-  
cides. sons.
- Kel. 15. But this resolution is quite reconcileable with what is laid  
1 Keb. 315. down in the books last cited: for it had been first resolved by the  
454. same judges, that King *Charles* the Second, notwithstanding he  
1 Hawk. had been for some years hindered from exercising the regal power,  
P. C. c. 17. had all that time been king *de facto* as well as *de jure*; and it is  
§ 17. certain, that no other person had, during that time, been in the  
actual possession of the crown.

High



High treason may be committed against the person on whom the crown does rightfully descend, although he have not been crowned; for it has been determined by all the judges, that the coronation of a king is only a ceremony (a).

3 Inst. 7.  
Watson's  
case.  
H. P. C. 12.  
1 Hawk.  
P. C.

c. 17. § 19. [(a) "I am very far from thinking," saith Sir M. Foster, "that the solemnity of a coronation is to be considered among us merely as a royal ceremony, or as a bare notification of the descent of the crown, as authors of high distinction have been pleased to express themselves. (3 Inst. 7. 1 Hal. 61. 101.) I admit, that it is, on the part of the nation, a publick solemn recognition, that the regal authority, and all the prerogatives of the crown, are vested in the person of the king, antecedently to that solemnity. But the solemnity of a coronation with us goeth a great deal further. The coronation oath importeth, on the part of the king, a publick solemn recognition of the fundamental rights of the people; and concludeth with an engagement, under the highest of all sanctions, that he will maintain and defend those rights; and to the utmost of his power make the laws of the realm the rule and measure of his conduct." Fost. Cr. L. 189.]

As there must sometimes be a failure of justice, if there were not always a person in whose name the laws might be administered, it is a maxim *that the king never dies*; and consequently high treason may be committed against a king before his proclamation: for he becomes a king immediately upon the demise of the person to whom he succeeds.

3 Inst. 7.  
1 H. H.  
P. C. 101.  
1 Hawk.  
P. C. c. 17.  
§ 19.

But, if the next heir to the crown be of the popish religion, or have married a papist, the crime of high treason cannot be committed against such person; for by the 1 W. & M. §. 2. c. 1. § 9. it is enacted, "That every person, who is or shall be reconciled to, or hold communion with, the see or church of *Rome*; or shall profess the popish religion; or shall marry a papist; shall be excluded, and be for ever incapable to inherit, possess, or enjoy, the crown and government of this realm and *Ireland*, and the dominions thereunto belonging, or any part of the same; or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be, and hereby are, absolved of their allegiance."

### (C) Of High Treason in the general.

DIVERS offences, which are not mentioned in the 25 Ed. 3. §. 5. c. 2., were, before the making of this statute, treason.

Bro. Treas.  
pl. 14.  
1 Hawk. P. C. 34.

It was high treason to have compassed the death of the father or uncle of the king.

3 Inst. 7.

If a subject of this realm, instead of having summoned another subject to answer in the king's courts, had summoned him to appear before the tribunal of a foreign prince, this was high treason.

Ibid.

By the 25 Ed. 3. §. 5. c. 2. after declaring certain offences to be treasons, it is enacted, "That because many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time, if any other case, supposed to be treason, which is not specified above, doth happen before any justice, the justice shall tarry, without proceeding

"to

“ to judgment of treason, until the case be laid before the king  
 “ in parliament, and it be declared, whether it ought to be ad-  
 “ judged treason or other felony.”

3 Inst. 22, 23. Notwithstanding this statute, some justices did presume to ad-  
 judge certain offences, not mentioned in this act, to be high trea-  
 sons: but they were, for so doing, severely punished.

3 Inst. 3. In consequence of the power given by this statute, divers of-  
 14. 23. fences were, by different parliaments, declared to be high trea-  
 sons.

3 Inst. 14. 23. As some of the acts of parliament, by which these offences were  
 so declared, were penned in general terms; others of them in  
 particular terms; and others in obscure terms: and as some of-  
 fences, which had in some parliaments been declared to be high  
 treasons, were, in other parliaments, declared not to be so, the  
 mischief, which arose from the difficulty of knowing what was  
 or what was not high treason, became as great as it had been before  
 the making of the 25 *Ed. 3. ft. 5. c. 2.*

In order to remedy this mischief, it is, by the 1 *Mar. ft. 1. c. 1. § 3.* enacted, “ That from henceforth none act, deed, or  
 “ offence, being by act of parliament made treason, by words,  
 “ writing, cyphering, deeds, or otherwise whatsoever, shall be  
 “ taken, had, deemed, or adjudged to be high treason, but only  
 “ such as be declared and expressed to be treason, in or by  
 “ the act of parliament made in the twenty-fifth year of the  
 “ reign of the most noble king of famous memory, *Edward the*  
 “ *Third*, touching or concerning treason or the declaration of  
 “ treason, and none other; any act or acts of parliament, had or  
 “ made at any time heretofore, or after the said twenty-fifth  
 “ year of the reign of the said late King *Edward the Third*, or  
 “ any other declaration or matter to the contrary in anywise not-  
 “ withstanding.”

7 Hawk. P. C. c. 17. § 71. As it is by this statute enacted, that from thenceforth no of-  
 fence shall be adjudged high treason, but only such as be declared  
 and expressed to be treason by the 25 *Ed. 3. ft. 5. c. 2.* it seems,  
 that the parliament have no power, under the 25 *Ed. 3. ft. 5. c. 2.* of declaring any offence high treason.

And if this be so, it follows, that no offence is at this day high  
 treason, unless it is declared to be so by the 25 *Ed. 3. ft. 5. c. 2.*  
 or has been made so by some statute subsequent to the 1 *Mar.*  
*ft. 1. c. 1.*

Flowd. 26. An offence is not to be adjudged high treason, unless it be  
 3 Inst. 12. clearly, and without argument or inference, within the meaning  
 20, 21. of some act of parliament; for no statute, whereby an offence is  
 18 El. c. 1. declared to be high treason, is to be extended by equity.  
 § 1.

Bro. Treas. There can be no accessory in high treason.

19. 3 Inst. 9. 138. H. P. C. 127. 215. 2 Hawk. P. C. c. 29. § 2.

1 Inst. 21. It seems to have been always agreed, that the same thing, which  
 138. would have made a man an accessory before the fact in any other  
 H. P. C. felony, does make him a principal in high treason.  
 127. 215.  
 2 Hawk. P. C. 310.

It has been holden, that the receiving and aiding of a traitor, after the offence has been committed, does not, in the case of counterfeiting the king's money, make a man a principal in high treason.

Dyer, 296.  
Conier's  
case.

But the better opinion is, that the receiving and aiding of a man, who has been guilty of counterfeiting the king's money, does make the person thereof guilty a principal in high treason.

3 Inst. 8. 13.  
H. P. C.  
127. 215.  
Keb. 33.  
2 H. P. C. 320.

By the 7 *Ann. c. 21. § 1.* it is enacted, "That, after the first day of *July* one thousand seven hundred and nine, such crimes and offences which are high treason within *England* shall be construed, adjudged, and taken to be high treason within *Scotland*; and that from thenceforth, no crimes or offences shall be high treason within *Scotland*, but those that are high treason within *England*."

The distinction of high and petit treason was not known to the law of *Scotland*; for every offence, which was by the law of *England* petit treason, was by the law of *Scotland* treason.

At this day, an offence, which is in *England* petit treason, is in *Scotland* only a capital offence: it being by the 7 *Ann. c. 21. § 7.* enacted, "That murder, under trust, which was by the law of *Scotland* treason, shall for the time to come be only adjudged and deemed to be a capital offence."

### (D) Of compassing or imagining the Death of certain Personages.

BY the 25 *Ed. 3. st. 5. c. 2. § 1.* it is declared to be high treason, "When a man doth compass or imagine the death of our lord the king, our lady his companion, or of their eldest son and heir; and thereof be provably attainted of overt deed by the people of their condition."

The word companion, in this clause, means wife.

A queen regnant is not expressly mentioned in this clause; but the construction has been, that such a queen is within the meaning of the words *our lord the king*.

3 Inst. 8, 9.  
3 Inst. 7.  
H. P. C. 12.  
1 Hawk.  
P. C. c. 17.

The husband of a queen regnant seems to be within the meaning of the words in this clause, *our lady his companion*: but as such husband is not expressly mentioned, it has been holden, that it is not high treason to compass or imagine his death.

3 Inst. 7.  
H. P. C. 12.  
1 Hawk.  
P. C. c. 17.

This clause does not extend to a queen dowager; inasmuch as she is not the companion of the king.

3 Inst. 8.  
1 H. P. C.  
124. 1 Hawk. P. C. c. 17.

If the companion of a king be divorced *a vinculo matrimonii*, it is not high treason to compass or imagine her death; because she ceases to be the companion of the king.

3 Inst. 9.  
1 H. P. C.  
124.

If the eldest son of the king or queen die during the life of the king or queen, without leaving issue, this clause extends to the next son; because he thereby becomes the eldest son and heir.

3 Inst. 8.  
H. P. C. 12.  
1 Hawk.  
P. C. c. 17.  
§ 21.

But

1 H.H.P.C. 125, 126. But it has been doubted, whether, if the eldest son of the king or queen die during the life of the king or queen, and leave issue a son, it be high treason to compass or imagine the death of such son.

1 H.H.P.C. 126, 127. It is said, that the eldest daughter of the king or queen is not within the meaning of this clause.

3 Inst. 9. It is in one book laid down, that this clause does not extend to a collateral heir, notwithstanding he has been proclaimed heir-apparent: but it is added, that if a collateral heir be declared heir-apparent by act of parliament, it extends to him.

1 H.H.P.C. 125. In another book it is doubted, whether this clause does extend to any collateral heir.

3 Inst. 6. As the words in this clause, *compass or imagine*, do imply design, it follows, that the taking away the life of one of the persons included therein is not high treason, unless it be accompanied with some circumstance of design.

3 Inst. 6. And before the making of the 25 Ed. 3. *st.* 2. *c.* 5. it was holden, in the case of Sir *Walter Tyrrell*, who shot an arrow by which *William* the Second was killed, that the taking away the life of this prince, by the accidental glancing of the arrow, was not high treason.

1 H.H.P.C. 119. But wherever a design upon the life of one of the persons comprehended in this clause is manifested by an overt act, this, although the design be not afterwards carried into execution, is high treason; inasmuch as the words of the clause are, “doth compass or imagine.”

Kel. 17. Fost. 196. If divers persons meet and consult how to kill the king, this is in every one of them an overt act of compassing or imagining his death, although no method of killing him be agreed upon.

3 Inst. 140. Nay the knowledge of a design to destroy the king, if accompanied with any circumstance of assent or approbation, is an overt act of compassing or imagining his death.

Kel. 17. 21. If a man, knowing that a meeting is to be holden to consult the destruction of the king, go to such meeting, this, although while there he say nothing, is evidence proper to be left to a jury of his assent to, or approbation of, the traitorous intention.

Kel. 17. 21. If a man, who has been accidentally present at a meeting holden to consult the destruction of the king, go a second time to such meeting, this is evidence of his assent to, or approbation of, the traitorous design.

The case of the Regicides. 1 Hawk. P. C. c. 17. Divers other acts, besides those which manifest a direct design upon the king's life, are overt acts of compassing or imagining his death.

3 Inst. 14. If a man excite a foreign prince to invade the realm, this is an overt act of compassing or imagining the king's death; because such excitation has a natural tendency to bring the king's life into danger.

The assembling of men, with an intention of compelling the king to comply with certain demands, is, for the same reason, an overt act of compassing or imagining his death.

3 Inst. 12.  
H. P. C. 13.  
Kel. 21.  
Moor, 621.

If divers persons are assembled for the purpose of imprisoning the king, this is an overt act in every one of them of compassing or imagining his death: inasmuch as it is probable that such imprisonment will end in his death.

3 Inst. 6. 12.  
H. P. C. 11.  
1 Hawk.  
P. C. c. 17.

It hath been doubted, whether the assembling of men with design to depose the king be an overt act of compassing or imagining his death; because there may, as it is said, be a design to depose the king without an intention to take away his life.

Bro. Treaf;  
Pl. 24.

But it seems to be the better opinion, that the assembling of men with design to depose the king is an overt act of compassing or imagining his death: because, if this design be carried into execution, the death of the king will, in all probability, be the consequence.

3 Inst. 6. 12.  
H. P. C. 11.  
2 Vent. 316.  
11 Mod.  
322.  
1 Hawk.  
P. C. c. 17.  
Vide Hardy's

[This better opinion hath been confirmed by the Judges in the late trials for treason. Trial, by Gurney.]

It is said, that a conspiracy to levy war against the king is not an overt act of compassing or imagining his death; for that, as the levying of war is, by another clause of the statute, declared to be one species of treason; such conspiracy ought not to be deemed an overt act of another species of treason; for that, if it should be so deemed, two species's of treason would be confounded.

3 Inst. 14.

But it has been resolved by all the judges, that although the persons so levying war that may be indicted for the treason of levying war, they may nevertheless be indicted for compassing or imagining the king's death; and that the levying of war may be laid as an overt act of compassing or imagining the king's death.

Kel. 20, 21.  
The case of  
the Regi-  
cides.

And in this case, besides expressly denying what is laid down in 3 Inst. 14. to be law, it is said, that what is there laid down is contrary to the cases of Lord *Cobham* and the Earl of *Effex*, which are cited by *Coke* Chief Justice but two pages before: in the last of which it had been holden, that the gathering of men together, with a design to compel the queen to comply with certain demands, was an overt act of compassing or imagining her death.

But, perhaps, upon considering the two passages, they will be found quite consistent.

The design in the cases of Lord *Cobham* and the Earl of *Effex* was to get the queen into the power of the persons assembled.

3 Inst. 12.

But in 3 Inst. 14. *Coke* Chief Justice only speaks of a levying war against the king generally.

Now, although the two propositions, that levying war with a design against the person of the king is an overt act of compassing or imagining his death, and that levying war against the king generally is not so, are not both law, they are by no means contradictory to each other.

But it may be fairly inferred from two modern books, that both the propositions are law.

1 Mod.  
322  
Durrell's  
case. Mich.  
2 G. 1.

In one of these, it is said to have been resolved by the court of King's Bench at a trial at bar, that a conspiracy to levy war in order to depose the king, which would be the civil death of the king, is an overt act of compassing or imagining his death: but that a conspiracy to levy war against the king generally is not so; because there may be such a levying of war as is treasonable, without an intention to depose the king.

1 Hawk.  
P. C. c. 17.

In the other these words are used in treating of that species of treason which consists in compassing or imagining the king's death: "It hath been adjudged, that levying war against the king's person, or the bare consulting to levy such war, is an overt act of compassing or imagining his death." But the book does not say, that the levying of war, or the consulting to levy a war, against the king generally, is so.

It seems to be agreed, that the publishing of written or printed words may be an overt act of compassing or imagining the king's death.

2 Roll. Rep.  
58.  
Williams's  
case.

And it has been holden, that the printing of a book containing treasonable positions, and sending it in a box to the king, is a publication of the book.

Dyer, 273.  
2 Roll. Rep.  
89. 1 Hawk.  
P. C. c. 17.

If any words in writing or print are published, which have a direct tendency to alienate the affections of the people from the king, such publication is an overt act of compassing or imagining his death: because this will, in all probability, be the consequence.

3 Inst. 14.  
H. P. C. 13.

The publishing of a printed book, or sending of a letter, to excite a foreign prince to invade the realm, is an overt act of compassing or imagining the king's death: for if there should be an invasion, his life would certainly be in danger.

Kel. 22, 23.  
Twynne's  
case.

If a book be published, in which it is asserted, that it is high time for the people to take the government into their own hands, and that it is honourable and conscientious to throw off all allegiance, and to put the king to death, this is an overt act of compassing or imagining the king's death.

2 Roll. Rep.  
83, 89.  
Williams's  
case.

It has been holden, that to publish in writing or print a prophecy of the king's death, is an overt act of compassing or imagining his death.

3 H. H. P. C.  
108.

But in another book it is said, that to prophesy the king's death does not seem to be an overt act of compassing or imagining his death.

H. P. C. 11.  
1 H. H. P. C.  
108.

And it is in the same book expressly laid down, that to calculate the king's nativity is not an overt act of compassing or imagining his death.

2 Roll. Rep.  
80.  
Williams's  
case.  
3 St. Tri.  
735. Sidney's case. Cro. Car. 125.

It has been holden, that the writing of words, which contain a treasonable position, does, although the same are never published, amount to an overt act of compassing or imagining the death of the king: for that *scribere est agere*.

But

But it seems to be the better opinion, that the writing of such words, unless they relate to some determinate treasonable design upon the king's life, does not, whilst the words remain in the hands of the writer unpublished, amount to an overt act of compassing or imagining the king's death; because they may have been written merely by way of amusement, and without any traiterous design.

It is laid down in two books, that the bare speaking of words can never be an overt act of compassing or imagining the king's death; and from the special acts of parliament, made at different times after the 25 *Ed. 3. st. 5. c. 2.* to attain persons guilty of speaking treasonable words, it is inferred, that such words are not an overt act of compassing or imagining the king's death within the meaning of that statute; for that, if they are so, the special acts would have been quite nugatory.

It is in other books laid down, that the bare speaking of words may be an overt act of compassing or imagining the king's death; for that words are the most natural way of expressing the imagination of the heart.

In a modern book it is said, that the rule which has been laid down since the Revolution is, that the speaking of words not relative to a design upon the king's life does not amount to an overt act of compassing or imagining his death: but that the speaking of words relative to a design upon the king's life does amount to an overt act of compassing or imagining his death.

The speaking of these words, *if I meet the king I will kill him*, has been holden an overt act of compassing or imagining his death.

It has been holden, that the speaking of these words, *the king being excommunicated by the pope, may be deposed and killed by any whatsoever, which killing is not murder*, is an overt act of compassing or imagining his death.

And it is said by *Holt* Chief Justice, that it is not necessary that the words should in such case be express: for that the speaking of any words, provided the jury are fully convinced, from the tenor of them, that the speaker had a design upon the king's life, is an overt act of compassing or imagining his death.

It is laid down, that the speaking of words, which plainly shew a design upon the king's life, is an overt act of compassing or imagining his death; although the design be future or conditional, or both future and conditional.

It seems to be agreed, that the speaking of words in contempt or disgrace of the king's person, as where the import of the words is a charge of a personal vice or a personal defect, is not an overt act of compassing or imagining his death.

It is in some books laid down, that to say the king is a bastard, or to say that another person has a better title to the crown than him, is an overt act of compassing or imagining his death; because it discovers the mind to be traiterous.

1 Hawk.  
P. C. c. 17.  
§ 32.  
Folt. 198.

3 Inst. 14.  
38. 140.  
1 H. H. P. C.  
111, 112.

St. P. C. 2.  
Yelv. 107.  
Kel. 13.  
1 Lev. 57.  
c. 17. § 32.

Folt. 200.

1 Lev. 57.  
Allcock's  
case.

1 Roll. Rep.  
185.  
Owen's case.

4 Stat. Tri.  
723.  
Lowick's  
case.

St. P. C. 2.  
Yelv. 107.  
Kel. 13.  
2 Mod. 55.  
1 Hawk. P. C. c. 17.

Cro. Car.  
125.  
Pine's case.  
1 Hawk.  
P. C. c. 17.

Yelv. 107.  
2 Roll. Rep.  
60.  
Paim. 426.

Salk. 631.  
Charnock's  
case.

But it is in one case said, that the speaking of loose words, which have no relation to a design upon the king's life, is not an overt act of compassing or imagining his death.

### (E) Of violating certain Personages.

BY the 25 *Ed. 3. ff. 5. c. 2.* it is declared to be high treason,  
“ If a man do violate the king's companion, or the eldest  
“ daughter of the king, not being married, or the companion of  
“ the eldest son and heir of the king; and thereof be provably  
“ attainted of overt deed, by people of his condition.”

3 Inst. 9.

The word violate in this clause does mean no more than carnally know; for if a man have carnal knowledge of one of the personages therein comprehended with her consent, he is equally guilty of high treason, as if he have had it by force.

3 Inst. 8, 9.

The word companion in this clause means wife.

3 Inst. 8, 9.

H. P. C. 12.

1 Hawk.

P. C. c. 17.

§ 22.

This clause does not extend to the violation of a queen dowager or a princess dowager; because neither of these is the companion of the king, or of the eldest son and heir of the king.

3 Inst. 9.

1 H. H. P. C.

125.

If carnal knowledge have been had of one of the personages comprehended within this clause with her consent, she is guilty of high treason.

3 Inst. 9.

1 H. H. P. C.

124.

If one of the personages, whom it would have been high treason to violate during coverture, be divorced *a vinculo matrimonii*, it is not high treason to violate her; because such personage does, after the divorce, cease to be the companion of the king, or of the eldest son and heir of the king.

3 Inst. 7.

H. P. C. 12.

1 Hawk.

P. C. c. 17.

§ 22.

It is laid down, that the eldest daughter of a queen regnant, not being married, although not within the words of this clause, is within the meaning thereof.

3 Inst. 9.

If the eldest daughter of the king or queen die during the life of the king or queen, the violation of the next daughter, who thereby becomes the eldest, while she is unmarried, is high treason; for by the words the *eldest daughter*, the eldest at the time of the violation is intended.

Ante, p. 116.

As it has been shewn who is eldest son and heir of the king or queen within the meaning of the 25 *Ed. 3. ff. 5. c. 2.* it is sufficient in this place to say, that the violation of the companion of such eldest son and heir is high treason.

3 Inst. 9.

H. P. C. 13,

14. 1 Hawk.

P. C. c. 17.

A conspiracy, although the intention of the conspirators be to bring about the violation of one of the personages comprehended in this clause, does not amount to an overt act of violating; for as the words thereof are *doth violate*, an actual violation is necessary to the completion of the offence.

3 Inst. 9.

10. 138.

H. P. C. 14.

Kel. 19.

1 Hawk.

P. C. c. 17.

But, if there have been a conspiracy to violate, and the intended violation be afterwards perpetrated, the conspiracy is an overt act of every one of the conspirators of violating; inasmuch as there can be no accessory in high treason.



## (F) Of levying War against the King.

**B**Y the 25 *Ed. 3. ft. 5. c. 2.* it is declared to be high treason,  
 “ If a man do levy war against our lord the king in his  
 “ realm, and thereof be provably attainted of overt deed by peo-  
 “ ple of his condition.”

Although this clause does not mention a queen regnant, the  
 construction has been, that such a queen is within the meaning of  
 the words, *our lord the king.*

3 Inst. 7.  
 H. P. C. 12.  
 1 Hawk.  
 P. C. c. 17.

As *Ireland*, although part of the dominions of the crown of  
*England*, is not part of the realm of *England*, levying war  
 against the king in *Ireland* is not a levying of war against him in  
 his realm : but there are the same laws, and some others, concern-  
 ing high treasons in *Ireland*, as there are in *England*.

1 H. H. P. C.  
 155.

The laws of *England* concerning high treasons are, by the 7 *An.*  
*c. 22. § 1.* expressly extended to *Scotland* : it being thereby en-  
 acted, “ That such crimes and offences, as are high treason  
 “ within *England*, shall be construed, adjudged, and taken to be  
 “ high treason within *Scotland* ;” and, consequently, levying war  
 against the king in *Scotland* is high treason within the meaning of  
 the 25 *Ed. 3. ft. 5. c. 2.*

Every assembling of a number of men, although they are armed  
 with weapons offensive and defensive, is not such a levying of war  
 against the king as is within the meaning of this clause.

For it is, by another clause of the 25 *Ed. 3. ft. 5. c. 2.* declared,  
 “ That if any man doth ride armed, openly or secretly, with a  
 “ number of armed men against any other, to slay him, or to rob  
 “ him, or to take and detain him until he pay a fine or a ransom  
 “ for his deliverance, it is not the intent of the king and his  
 “ council, that in this case it be adjudged high treason ; but that  
 “ it be adjudged felony or trespass, according to the law of the  
 “ land heretofore used, and according to what the case may re-  
 “ quire.”

Although the words of this clause do extend only to the cases  
 of a number of persons armed being assembled with intention to  
 kill, rob, or imprison, the equity thereof extends to all risings, to  
 assert a private right ; or to destroy particular inclosures ; or to  
 remove a nuisance which affected, or was thought to affect, in  
 point of interest, the persons assembled ; or to break prison, in  
 order to relieve particular persons ; because every such offence, al-  
 though it have a warlike appearance, is not raised against the  
 king or his royal majesty, but for a purpose of a private na-  
 ture.

1 H. H.  
 P. C.  
 135. 149.  
 260.  
 Fost. 209,  
 210.

Five of the judges were of opinion, that the rising of the weav-  
 ers in and about *London* to destroy all engine-looms, by the use  
 of which some persons were enabled to undersell others who did  
 not use such looms, did not amount to an overt act of levying  
 war against the king. The affair was considered by those judges,  
 and in my opinion rightly, as a private quarrel betwixt men of  
 the same trade, concerning the use of particular engines. which

Fost. 210.

was thought to be detrimental to those concerned in the rising. Five of the judges were indeed of a different opinion: but the Attorney-General thought proper to proceed against the insurgents, as for a riot only.

Poph. 121,  
122.  
2 And. 67. It has been holden by all the judges, that it is lawful for all the king's subjects to arm themselves, without any special commission for so doing, in order to suppress a riot or a rebellion.

5 Stat. Tr.  
37.  
Vaughan's  
case.  
Salk. 635.  
S. C. If a number of men, armed with weapons offensive and defensive, are assembled with a treasonable design, this is an overt act in every one of them, of levying war against the king, although nothing further be done.

But the being in company with such as are guilty of levying war against the king is not, in all cases, an overt act of such levying war.

3 Inst. 10. It was found, by a special verdict, that divers persons, who were in company with those who had levied war against the king, had joined them *pro timore mortis*. It was adjudged, that this was not an overt act of levying war against the king; because what they did was done for fear of death.

Kel. 73, 79.  
Green's  
case.  
Ld. Raym.  
2585. It was found by a special verdict, that a great number of persons armed were assembled, under the pretence of pulling down bawdy-houses; that the defendant was amongst them, throwing up his cap, and hallowing, with a staff in his hand; and that, whilst he was amongst them, he was knocked down by a party of the king's soldiers, who came to suppress them, and was then taken: but as the verdict did not find any particular act of force committed by the defendant, or that he was aiding or assisting to the rest, the judges all agreed, that this was not an overt act of levying war against the king; because it is possible that he might have been there only out of curiosity.

Moor, 621,  
622.  
Kel. 76, 77. But, if a man have attended one of the principal persons amongst the insurgents, from the beginning of an insurrection, this, although he was not privy to the design, is an overt act of levying war against the king.

3 Inst. 9.  
7 Hawk.  
P. C. c. 17. Every assembling of a number of men in a warlike manner, to withstand the king's lawful authority, is an overt act of levying war against the king.

Bro. Treas.  
pl. 24.  
3 Inst. 10. H. P. C. 14. The defending of a fort or castle against the king's forces is an overt act of levying war against the king.

3 Inst. 10. An insurrection to raise the price of servants' wages, contrary to the statute of labourers, was holden, by all the judges, to be an overt act of levying war against the king; because the offenders took upon themselves the reformation of the law, which subjects, by the gathering of power, ought not to do.

3 Inst. 9.  
2 And. 4. It is in two books laid down generally, that if a number of men assemble in a warlike manner, in order to deliver men out of prisons, this is an overt act of levying war against the king.

In other books it is laid down, that an insurrection with a design to break open one gaol, and set the prisoners therein at liberty, is not an overt act of levying war against the king, but that an insurrection with a design to break all prisons, and set all prisoners at liberty, is.

Every assembling of a number of men, in a warlike manner, with an intention to reform the government or the law, is an overt act of levying war against the king.

3 Inst. 9, 10.  
Poph. 122.  
Kel. 76, 77.  
1 Hawk. P. C. c. 17.

The Earl of *Essex* went from his house with a number of armed men into the city of *London*, and prayed the assistance of the citizens to force his way to the queen, in order to remove his enemies from her person. This was adjudged an overt act of levying war against the queen.

Moor, 621.  
Earl of  
Essex's case.

A number of persons armed in a warlike manner went to *Lambeth-house* with a design to seize the Archbishop of *Canterbury*, who was one of his Majesty's privy counsellours. This was holden to be an overt act of levying war against the king.

Cro. Car.  
589.  
Bensted's  
case.

An insurrection, with an intention to alter the religion established by law, is an overt act of levying war against the king.

3 Inst. 9.  
H. P. C. 14.  
Poph. 122.  
1 Hawk. P. C. c. 17.

Every assembling of a number of men, in a warlike manner, with a design to redress a publick grievance, is an overt act of levying war against the king; because this, it being an attempt to do that by private authority which only ought to be done by the king's authority, is an invasion of the royal prerogative.

3 Inst. 9.  
H. P. C. 14.  
Kel. 71.  
Sid. 358.  
1 Hawk.  
P. C. c. 17.

An insurrection, with a design to pull down all bawdy-houses, was holden to be an overt act of levying war against the king.

Kel. 71.  
Sid. 358.

If a number of men assemble in a warlike manner, with a design to throw down all inclosures, this is an overt act of levying war against the king.

3 Inst. 10.  
H. P. C. 14.  
1 Hawk.  
P. C. c. 17.

But, if a number of men, armed in a warlike manner, are assembled with an intention of only throwing down a particular inclosure, by which they are prevented from enjoying a right of common, this may amount to a rout or riot; but it is not an overt act of levying war against the king; because the design, in this case, is the redress of a private grievance.

3 Inst. 10.  
H. P. C. 14.  
1 Hawk.  
P. C. c. 17.

As the words of this clause are *do levy war*, a conspiracy with an intention to levy war against the king does not amount to an overt act of levying war against him.

3 Inst. 9.  
H. P. C. 13.  
14.  
1 Hawk. P. C. c. 17.

But, if there have been such conspiracy, and war be afterwards levied, the conspiracy is, in every one of the conspirators, an overt act of levying war against the king, inasmuch as there can be no accessory in high treason.

3 Inst. 9.  
10. 138.  
H. P. C. 14.  
Kel. 19.  
1 Hawk. P. C. c. 17.

## (G) Of adhering to the King's Enemies.

BY the 25 *Ed. 3. ft. 5. c. 2.* it is declared to be high treason,  
 “ If a man be adherent to the enemies of our lord the king,  
 “ in the realm, giving to them aid or comfort in his realm, or  
 “ elfewhere; and thereof is provably attainted of overt deed by  
 “ people of his condition.”

A queen regnant is not mentioned in this clause: but the construction has been, that such a queen is within the meaning of the words *our lord the king*.  
 3 Inst. 7.  
 H. P. C. 12.  
 1 Hawk.  
 P. C. c. 17.  
 § 20.

The word *enemies* in this clause is not confined to the subjects of a state at war with the king; for if any of the subjects of a state in amity with the king have commenced, or have made preparations for the commencing of hostilities against the king, these are his enemies.

Salk. 635.  
 Vaughan's case.

If any subjects of a state in amity with the king are in the service of a state at war with the king, the giving aid or comfort to these is adhering to the king's enemies; for they are to be considered by all states, except that of which they are subjects, as the subjects of the state in whose service they are.

Duke of  
 Norfolk's case. 1 H.  
 H. P. C.  
 164.

It was holden, that the *Scots*, who invaded the realm in the reign of Queen *Elizabeth*, were the queen's enemies within the meaning of this clause; although there was at that time no war betwixt *England* and *Scotland*.

5 Stat. Tr.  
 37.  
 Vaughan's case.

If the *French* king should, in time of peace, send an army to one of the sea ports of *France*, with a design to invade any part of the king's dominions, every *French* subject in that army would be one of the king's enemies.

Salk. 635.  
 Vaughan's case.  
 1 Hawk.  
 P. C. c. 17. § 23.

It has been holden, that adhering to the subjects of a state at war with the king, against the king's allies, is an adhering to the king's enemies.

3 Inst. 11.  
 H. P. C. 14.  
 115.  
 3 Inst. 11.

Aiding or comforting the king's subjects, who have levied war against him, makes the person who does this a principal in the high treason of levying war against the king: but it is not an adherence to the king's enemies; because such subjects are not enemies, but traitors.

1 Inst. 10.  
 H. P. C. 14.  
 1 Hawk.  
 P. C. c. 17. § 23.

The giving of any kind of aid or comfort to the king's enemies is an overt act of adhering to them.

*Ibid.*

If a castle belonging to the king be surrendered for reward to his enemies, this is an overt act of adhering to them.

a Ventr. 31.  
 Harding's case.

The enlisting of a man, and sending him into the service of a state at war with the king, is an overt act of adhering to the king's enemies.

Salk. 635.  
 Vaughan's case.

If one of the king's subjects be enlisted into the service of a state at war with the king, and march, this is an overt act of adhering to the king's enemies.

If a man take a commission, to cruise in one of the ships of a state at war with the king, against the king's ships, or against the ships of his subjects or allies, and go on board the ship, this is an overt act of adhering to the king's enemies, although he never commit any act of hostility.

5 Stat. Tr.  
37-  
Vaughan's  
case.  
Saik. 635.

But, if one of the king's subjects do reside in a state at war with the king, without giving any assistance to the carrying on of the war, this is not an overt act of adhering to the king's enemies.

1 H. H.  
P. C. 165.

In a very late case, it was insisted for the defendant, at a trial at bar, that sending letters of advice or intelligence to the subjects of a state at war with the king is not an overt act of adhering to the king's enemies.

MS. Rep.  
Hensley's  
case, Trin.  
31 G. 2.  
1 Burr. 646.  
529. S. P.]

10 Stat. Tr. App. 77. [Rex v. Stone, 6 Term Rep.

And from the 2 & 3 Ann. c. 20. § 34. by which it is enacted, "That if any officer or soldier in her Majesty's army shall give advice or intelligence to any enemy of her Majesty, either by letters, messages, signs, or tokens, or in any way whatsoever, such person shall be adjudged guilty of high treason," it was inferred, that if the giving of such intelligence had before been an overt act in every subject of adhering to the king's enemies, it was unnecessary to enact, by a new statute, that the doing thereof should be high treason in an officer or soldier.

But the judges of the court of King's Bench were clearly of opinion, that the sending of such letters is an overt act of adhering to the king's enemies; and it was said, that the same had been holden by all the judges in *Gregg's* case, which was subsequent to the statute of the 2 & 3 Ann. c. 20.

It was likewise resolved in this case, that the sending of such letters, although they were intercepted at the post-office, and did not go, is an overt act of adhering to the king's enemies; and it was said, that the same had been holden by all the judges in *Gregg's* case.

A conspiracy, with an intention to give aid or comfort to the king's enemies, does not amount to an overt act of adhering to the king's enemies; for as the words of this clause are *be adherent*, an actual adherence is necessary to the completion of the offence.

3 Inst. 9.  
H. P. C. 13,  
14.  
1 Hawk.  
P. C. c. 17.  
§ 27.

But, if there have been such conspiracy, and aid or comfort be afterwards given, the conspiracy is an overt act in every one of the conspirators of adhering to the king's enemies, inasmuch as there can be no accessory in high treason.

3 Inst. 9,  
10. 138.  
H. P. C. 14.  
Kel. 19  
1 Hawk. P. C. *ubi supra*.

## (H) Of counterfeiting the Great Seal, Privy Seal, Privy Signet, or Sign Manual.

BY the 25 Ed. 3. ft. 5. c. 2. it is declared to be high treason, "If a man counterfeit the king's great or privy seal."

By the 1 Mar. ft. 5. c. 6. § 2. it is enacted, "That if any person doth falsely forge or counterfeit the queen's sign manual,

" or privy signet, every such offence shall be deemed and adjudged " high treason."

And by the 7 *Ann. c. 21. § 9.* it is enacted, " That if any " person shall counterfeit her Majesty's seals, appointed by the " twenty-fourth article of the Union to be kept, used, and con- " tinued in *Scotland*, that the doing thereof shall be construed " and adjudged to be high treason."

3 Inst. 15.  
1 H.H.P.C.  
181. It is not a counterfeiting within the meaning of any one of these statutes, unless the counterfeit thing resemble the thing counterfeited.

But it is not necessary that there should be an exact resemblance between the thing counterfeited and the counterfeit thing.

2 Roll. Rep.  
50.  
Robinson's  
case.  
1 H.H.P.C.  
184. A person had counterfeited the privy seal: but, that there might be some differences between the counterfeit and the true privy seal, he had, with design, left out the crown; and he had also left out some letters and inserted others in their stead. This, notwithstanding the differences, was holden to be a counterfeiting of the privy seal.

1 H.H.P.C.  
185. It is said, that the engraving of a seal, which resembles the great seal, without a warrant from the king, does not seem to be a counterfeiting of the great seal, within the meaning of the 25 *Ed. 3. st. 5. c. 2.* unless an impression of the engraved seal be affixed to some instrument.

*Ibid.* And *Hale*, Chief Justice, in speaking of this, mentioned the case of making a tool or instrument for coining money, which, at the time he wrote, was not high treason, unless some counterfeit money had been actually coined therewith.

But, as these cases are not similar, the words of the statute being in the one case *doth counterfeit the king's great seal*, in the other *doth counterfeit the king's money*, the case mentioned does not conclude to the point.

2 Roll. Rep.  
50.  
Robinson's  
case. It is in one case said, that where a man had affixed an impression of a counterfeit privy seal to a patent, and had afterwards obtained the great seal to be affixed to the patent, and collected money by virtue thereof, this was, upon the whole circumstances of the case, adjudged to be a counterfeiting of the privy seal.

But it seems to be the better opinion, that counterfeiting an impression of any one of the three seals, or the sign manual, is high treason, although no improper use be made of the counterfeit thing.

The statutes, which prohibit the counterfeiting of any one of these seals, or the sign manual, are entirely silent as to the use that may be made of the counterfeit thing.

1 H.H.P.C.  
184. In one book, of the best authority, the counterfeiting of an impression of any one of these seals, or the sign manual, is, without saying any thing further, laid down to be high treason.

Bro. Treas.  
pl. 27.  
3 Inst. 16.  
1 H.H.P.C.  
214. And in the case of counterfeiting the king's money, the counterfeiting has been holden to be high treason, although the counterfeit money were not uttered.

It has been holden, that the counterfeiting of a great seal, which has not for some time been made use of, is high treason. 1 H.H.P.C. 177.

At the common law a misuse or an abuse of the great seal was, in some cases, high treason.

If the Chancellour had affixed the great seal to an instrument, without the proper warrant for so doing, this would, at the common law, have been high treason; because it was a misuse of the great seal. 3 Inst. 15, 16.  
H.P.C. 18.

If a man, after stealing or finding the great seal, had affixed it to an instrument, this, it being an abuse of the great seal, by a person who never had authority to use it, would, at the common law, have been high treason. 3 Inst. 16.

But neither a misuse nor an abuse of the great seal is, since the 25 Ed. 3. *st.* 5. *c.* 2. high treason; because, there is not, in either case, a counterfeiting thereof. 3 Inst. 15, 16.  
H.P.C. 18.

The making of any alteration in, or addition to, what is contained in an instrument, after the great seal has been thereto affixed, is not high treason; because this is only an abuse of the great seal. 3 Inst. 15.  
Kel. 80.  
1 Hawk.  
P. C. c. 17.  
§ 52.

It is not, for the same reason, high treason to take the wax, which has been impressed with the great seal, from one instrument, and affix it to another. 3 Inst. 15, 16.  
H.P.C. 18.  
Kel. 80. 1 Hawk. P. C. *ubi supra*.

An intent, or an attempt, to counterfeit one of the three seals, or the sign manual, is not high treason; for, as the words of the statute are *doth counterfeit*, the offence is not complete unless there be an actual counterfeiting. 3 Inst. 15.  
1 Hawk.  
P. C. *ubi supra*.

But, if any one of these seals or the sign manual has been counterfeited, every person, who was aiding in or consenting to the counterfeiting, is guilty of high treason; inasmuch as there can be no accessory in high treason. 3 Inst. 16.  
138.  
H.P.C. 14.  
18.  
Kel. 19.

## (I) Of counterfeiting or diminishing the Money current.

BY the 25 Ed. 3. *st.* 5. *c.* 2. it is declared to be high treason, "If a man doth counterfeit the king's money."

It is laid down, that the words *the king's money*, in this clause, do, only mean such gold and silver coins as are coined within the realm. 2 Inst. 577.  
1 Hawk.  
P. C. c. 17.  
§ 57.

It seems, from a late transaction, that the counterfeiting of money, after a stop has been put to the currency thereof, is not a counterfeiting within the meaning of this clause.

The currency of the gold coins called *broad pieces* was put a stop to by a proclamation, bearing date the twenty-first day of February one thousand seven hundred and thirty-two; and, by the same proclamation, the collectors and receivers of the revenue tax or taxes were commanded to receive such broad pieces, for and during the space of one year from the date thereof, at the

rate of four pounds one shilling *per* ounce troy, in all payments on account of the revenue tax or taxes.

By the 6 *Geo. 2. c. 26.* which statute was made very soon after this proclamation, it was enacted, "That if any person shall, on  
" or before the twenty-first day of *February* one thousand seven  
" hundred and thirty-three, forge or counterfeit any of the gold  
" coins called *broad pieces*, every such offender shall be adjudged  
" guilty of high treason."

This seems to be a legislative declaration, that the forging or counterfeiting of the king's money coined within the realm, after a stop is put to the currency thereof, is not high treason within the 25 *Ed. 3. ft. 5. c. 2.*; for if it be so, there was no need to make it so in this particular case by an express statute.

A counterfeiting of the king's money in *Ireland*, or in any other place subject to the *British* crown, is a counterfeiting within the meaning of the 25 *Ed. 3. ft. 5. c. 2.*

If a person, employed by the king in coining, coin money of less weight than it ought to be, or with more alloy in it than there ought to be, this is a counterfeiting of the king's money within the meaning of the 25 *Ed. 3. ft. 5. c. 2.*

By the 1 *Mar. ft. 2. c. 6.* it is enacted, "That if any person  
" or persons shall falsely forge and counterfeit any such coin of  
" gold or silver, as is not the proper coin of this realm, and is  
" or shall be current within this realm, by the consent of the  
" queen, her heirs, or successors, every such offence shall be deemed  
" and adjudged high treason."

By a clause in this statute it is expressly enacted, "That the  
" counsellours, procurers, aiders, and abettors of the person or  
" persons guilty of the offence thereby made high treason, shall  
" be deemed and adjudged guilty of high treason."

And there is in all subsequent statutes, which make any offence relating to money high treason, a clause to the same effect.

But all these clauses seem to be rather *ex abundanti cautela*, or *in terrorem*, than *ex necessitate*.

It was indeed holden, in one old case, that the receiving and aiding of a man after he had been guilty of counterfeiting the king's money is not high treason.

But it is, in divers books, laid down, that such receiving and aiding make the person guilty thereof a principal in this, as well as in any other species of high treason.

And it was resolved at the *Old-Bailey*, by all the judges present, that the uttering of counterfeit money by a person who knew the counterfeiter thereof, is high treason; because it is an aiding after the fact.

By the 5 *El. c. 11. § 2.* it is enacted, "That from and after  
" the fifth day of *May* next coming, clipping, washing, round-  
" ing, or filing, for wicked lucre or gain's sake, of any of the  
" proper monies or coins of this realm, or the dominions thereof,

" or

1 Hawk.

P. C. c. 17.  
§ 67.

3 Inst. 16,  
17. Bro.  
Treas. pl. 19.  
1 Hawk.  
P. C. c. 17.  
§ 55.

Dyer, 296.  
Conier's  
case. Mich.  
12 El.

3 Inst. 138.  
H.P.C. 127.  
215.

Kel. 33.  
Clark's case,  
31 Aug.  
36 Car. 2.



“ or of the monies or coins of any other realm, allowed to be current within this realm, or the dominions thereof, at this present; or that hereafter shall be lawful monies or coins of this realm, or the dominions thereof, or of any other realm, and by proclamation allowed to be current here by the queen’s Majesty, her heirs or successors: shall be taken, deemed, and adjudged, by virtue of this act, to be high treason.”

By the 18 *El. c. 1. § 1.* after reciting, that, since the making of the statute of the fifth year of her Majesty’s reign, divers evil-disposed persons, knowing that the said law ought to be expounded strictly, according to the words thereof, and that like offences ought not, by any equity, to receive the like punishments, have devised arts for the diminishing of monies and coins, to the loss as well of her Majesty as of her subjects, it is enacted, “ That if any person shall, from and after the fifth day of *May* next coming, for wicked lucre and gain’s sake, by any art, way, or means whatsoever, impair, diminish, falsify, scale, or lighten the proper monies or coins of this realm, or any the dominions thereof, or the monies or coins of any other realm, allowed to be current at the time of the offence committed within this realm or any of the dominions of the same, by the proclamation of the queen’s Majesty, her heirs or successors; every such offence shall be taken, adjudged, and deemed to be high treason.”

By the 8 & 9 *W. 3. c. 26. § 7.* [made perpetual by 7 *Ann. c. 25.*] after reciting, that, notwithstanding the laws in force against counterfeiting the monies and coins of this realm, this offence doth daily increase, it is enacted, “ That no smith, engraver, founder, or other person or persons whatsoever, (other than and except the persons employed, or to be employed, in or for his Majesty’s mint or mints, in the Tower of *London*, or elsewhere, and for the use and service of the said mints only; or persons lawfully authorized by the Lords Commissioners of the Treasury, or Lord High Treasurer, for the time being,) shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould (a) of steel, iron, silver, or other metal or metals, or of spaud, fine founders’ earth, sand, or any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude, of both or either of the sides or flats of any gold or silver coin current within this kingdom; nor shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending, of any edger or edging tool, instrument or engine, not of common use in any trade, but contrived for marking of money round the edges with letters, grainings, or other marks or figures, resembling those on the edges of money coined in his Majesty’s mint, nor any press for coinage, nor any cutting engine for cutting round blanks by force of a screw out of flatted bars of gold, silver, or other metal;

[(a) Hugh Lennard was indicted for having in his possession “ one “ mould of “ lead.”— As the words “ mould or “ pattern” are omitted in the last clause of this section of the act, it was submitted to the opinion of the judges, first, Whether “ a “ mould” is comprised under the general words “ other tool “ or instrument “ above “ mention- “ ed.” And, secondly, if it be so com-

prised, Whether it should not be described in the indictment as "a tool or instrument" mentioned in the statute?—The Judges were unanimous,

"metal; nor shall knowingly buy or sell, hide or conceal, or without lawful authority or sufficient excuse for that purpose knowingly have in his, her, or their houses, custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, die, edger, cutting engine, or other tool or instrument, before mentioned; and if any smith, engraver, founder, or other person or persons whatsoever, (other than and except as aforesaid,) shall offend in any of the matters or things aforesaid, then all and every such offender and offenders shall be, and is and are hereby adjudged to be, guilty of high treason."

first, That this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under the general words. And, secondly, That, as it is expressly mentioned by name in the first clause, with respect to the making or mending, it need not be averred to be a tool or instrument so mentioned. 2 Bl. Rep. 809. So also in the same case, whether a mould, having only a resemblance of the coin inverted, was not an instrument, which would *make and impress* the resemblance rather than one on which the *resemblance* was made and impressed, (which was the way it was laid in this indictment,) the statute seeming to distinguish between such as will make or impress the similitude, &c. as a matrix, die, or mould; and such on which the same is made or impressed, as a puncheon, &c. A great majority of the judges thought the indictment good, because the *stamp* of the coin was *certainly* impressed on the mould; but they thought it would have been more accurate, had it charged "mould that would make and impress the similitude," &c. And in this opinion, some, who otherwise doubted, acquiesced. 2 Bl. Rep. 822. But an instrument which would only impress the figure of only part of one side of the coin, is not within the statute. Ca. temp. Hardw. 371.]

By § 2. it is enacted, "That if any person or persons whatsoever shall, without lawful authority for that purpose, wittingly or knowingly convey, or assist in conveying, out of his Majesty's mint in the Tower of London, or out of any other of his Majesty's mints, any puncheon, counter-puncheon, matrix, die, stamp, edger, cutting engine, press, or other tool, engine, or instrument, used for or about the coining monies there, or any useful part of such tools or instruments, that then, as well the said person and persons so offending, as also all and every person and persons knowingly receiving, hiding, or concealing the same, shall be, and is and are hereby adjudged to be, guilty of high treason."

By § 2. it is enacted, "That if any person or persons (other than the persons employed in his Majesty's mint or mints, or such as shall have authority from the Lords Commissioners of the Treasury, or the Lord High Treasurer, for the time being) shall mark on the edges any of the current coin of this kingdom, or if any person or persons whatsoever shall mark on the edges any of the diminished coin of this kingdom, or any counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures, like unto those on the edges of money coined in his Majesty's mint; every such offence shall be, and is hereby adjudged to be, high treason."

By § 4. it is enacted, "That if any person or persons whatsoever shall colour, gild, or case over, with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling any of the current coin of this kingdom, or any round blanks of base metal, or of coarse gold or silver, of a fit size and figure to be coined into counterfeit milled money, resembling any of the gold or silver coin of this kingdom;

[It has been resolved upon this clause of the statute, that it is immaterial, whether the colouring be

“ kingdom ; or if any person or persons shall gild over any silver  
 “ blanks, of a fit size to be coined into pieces resembling the cur-  
 “ rent gold coin of this kingdom ; all and every such person and  
 “ persons so offending shall be, and is and are hereby adjudged  
 “ to be, guilty of high treason.”

effected im-  
 mediately  
 by some ex-  
 ternal and  
 superficial  
 application,  
 or otherwise.

tently by extraction from the application of *aqua fortis*, or other chemical power. *Rex v. Lacy and Parker*, O. B. 6 Dec. 1776. *Leach's Hawkins*, c. 17.]

By the 15 G. 2. c. 28. § 1. it is enacted, “ That if any person  
 “ whatsoever shall, after the twenty-ninth day of *September* one  
 “ thousand seven hundred and forty-two, wash, gild, or colour  
 “ any of the lawful silver coin called a *shilling* or a *sixpence*, or any  
 “ counterfeit or false shilling or sixpence, or add to or alter the  
 “ impression, or any part of the impression, of either side of such  
 “ lawful or counterfeit shilling or sixpence, with intent to make  
 “ such shilling resemble, look like, or pass for a piece of lawful  
 “ gold coin called a *guinea* ; or with intent to make such sixpence  
 “ resemble, look like, or pass for a piece of lawful gold coin called  
 “ a *half-guinea* ; or shall file, or any ways alter, wash, or colour,  
 “ any of the brass monies called *halfpence* or *farthings*, or add to  
 “ or alter the impression, or any part of the impression, of either  
 “ side of a halfpenny or farthing, with intent to make a half-  
 “ penny resemble, look like, or pass for a lawful shilling ; or with  
 “ intent to make a farthing resemble, look like, or pass for a law-  
 “ ful sixpence ; the person or persons so offending in any of the  
 “ matters aforesaid, shall be, and is and are hereby adjudged to  
 “ be, guilty of high treason.”

It seems to have been always the better opinion, that only gold  
 or silver coins are the king's money within the meaning of the  
 25 *Ed. 3. §. 5. c. 2.*

2 Inst. 577.  
 1 Hawk.  
 P. C. c. 17.  
 § 57.

Some doubt seems formerly to have been entertained, whether  
 the counterfeiting of copper money, made current by proclamation,  
 were not high treason.

1 H. H. P. C.  
 211.

In order to remove all doubt concerning this matter, it is by  
 the 15 G. 2. c. 28. § 6. declared, “ That the coining or counter-  
 “ feiting any of the copper money of this kingdom is only a mis-  
 “ demeanour.”

It has already been observed, that the counterfeiting of the  
 great seal is not high treason, unless the counterfeit seal be like  
 the true great seal.

Ante, p. 125.

There seems to be equal reason to hold, that the counterfeiting  
 of money is not high treason, unless the counterfeit money be  
 like the true money : for the word *counterfeit* implies a likeness ;  
 and if there be not a likeness, there is very little danger of impos-  
 sition or fraud from the counterfeit money.

It is moreover said in one book, that it is a counterfeiting with-  
 in the meaning of the 25 *Ed. 3. §. 5. c. 2.* although the counter-  
 feited money be not exactly like the true money ; from whence it  
 may fairly be inferred, that a likeness is necessary.

1 H. H. P. C.  
 215.

And

And that clause of the 25 *Ed. 3. fl. 5. c. 2.* which makes it high treason to bring counterfeit money into the realm, has in it these words *counterfeit to the money of England.*

2 Bl. Rep.  
622.

[It has been resolved, that to counterfeit the impresson of half-a-guinea on a piece of gold previously hammered, not round, and not passable in the condition it was, is not high treason; for the offence is incomplete.]

Bro. Treas.  
pl. 27.

3 Inst. 16.

1 H. H. P. C.

214. 1 Hawk. P. C. c. 17. § 55.

The counterfeiting of money is high treason, although the same be not uttered; for neither the 25 *Ed. 3. fl. 5. c. 2.* nor any other of the statutes make uttering a part of the offence,

H. P. C. 127.

Kel. 33.

1 Hawk.

P. C. c. 17.

§ 56.

The uttering of counterfeit money was heretofore only a misdemeanour, although the person who uttered such money knew it to be counterfeit.

But by the 15 *G. 2. c. 28.* this offence is, in some cases, made felony.

## (K) Of bringing counterfeit Money into the Realm.

BY the 25 *Ed. 3. fl. 5. c. 2.* it is declared to be high treason, “ If a man bring false money into this realm, counterfeit to the money of *England*, as the money called *Lusburgh*, or other like to the said money of *England*, knowing the money to be false, to merchandize or make payment, in deceit of our lord the king and of his people.”

By the 1 & 2 *Ph. & Mar. c. 11.* after reciting that many ill-disposed persons have of late brought into this realm, from parts beyond the seas, forged and counterfeit money, like to such coins of gold and silver of other realms, as, by the consent of the king and queen our sovereign lord and lady, are allowed to be current within this realm; and have uttered the same here by merchandizing and otherwise; because the said ill-disposed persons have perceived, that there is not any sufficient law provided for the condign punishment of offenders in that behalf, it is enacted, “ That if any person or persons shall bring from the parts beyond the sea into this realm, or into any of the dominions of the same, any such false and counterfeit coin or money, being current within this realm as is aforesaid, knowing the same coin or money to be false or counterfeit, to the intent to utter or make payment with the same, within this realm or any the dominions of the same, by merchandizing or otherwise; that all and every such person or persons so offending shall be deemed and adjudged to be offenders in high treason.”

Bringing counterfeit money into the realm is not within the meaning of these statutes, unless it be like either the money of *England*, or like such money of other realms as is current within this realm.

But

But it is not necessary that the counterfeit money should be exactly like the true money. 1 H. H. P. C. 184. 214.

The counterfeit money must, in order to constitute this offence, be brought from a foreign nation, and not from any place subject to the *English* crown; for, although every such place is, to many purposes, distinct from the realm, and, consequently, a bringing into the realm from such a place would be a bringing into the realm within the letter of the 25 *Ed. 3. st. 5. c. 2.* or the 1 & 2 *Ph. & Mar. c. 11.* the construction has been, that the bringing of counterfeit money from *Ireland*, or any place subject to the *English* crown, into *England*, is not such a bringing into the realm as is within the meaning of either of these statutes. 3 Inst. 18.  
1 Hawk.  
P. C. c. 17.  
§ 67.

It is laid down in one book, that the bringing of counterfeit money into the realm from a foreign nation is not high treason; unless there be a merchandizing with or a payment of the money. 3 Inst. 18.

In other books it is laid down, that as an actual merchandizing with or payment of the money is not made part of the offence by the 25 *Ed. 3. st. 5. c. c. 2.* or by the 1 & 2 *Ph. & M. c. 11.* the bringing of counterfeit money into the realm, with an intention to merchandize therewith, or make payment thereof, is high treason; and that the bringing of it in is evidence of such intent. 1 H. H. P. C. 229.  
1 Hawk.  
P. C. c. 17.  
§ 69.

The former, however, seems to be the better opinion.

For in the 25 *Ed. 3. st. 2. c. 5.* the words are, *doth bring false money into this realm, counterfeit to the money of England, to merchandize or make payment*; which seem to imply, that there may be a bringing of counterfeit money into the realm, without an intention to merchandize or make payment; and if so, it would be a very hard construction to hold, that the bringing in is in itself evidence of such intention.

And in the 1 & 2 *Ph. & M. c. 11.* the uttering of counterfeit money, brought from a foreign realm, *here by merchandizing and otherwise*, is recited as part of the mischief, which is by that statute intended to be remedied.

The uttering of counterfeit money brought into the realm from a foreign realm is not high treason, unless it be uttered by the person who brought it in; the bringing of it into the realm only being made high treason. 3 Inst. 18.  
H. P. C. 21.  
1 Hawk.  
P. C. c. 17.  
§ 68.

### (L) Of slaying certain Officers.

BY the 25 *Ed. 3. st. 5. c. 2.* it is declared to be high treason, "If a man slay the Chancellour, Treasurer, or any justice of our lord the king of the one bench or of the other, a justice in eyre or of assize, and all other justices assigned to hear and determine, being in their places doing their offices."

The construction has been, that this clause does not extend to any officers, except those which are therein expressly mentioned. 3 Inst. 18.  
H. P. C. 17.  
1 Hawk.  
P. C. c. 17. § 47.

3 Inst. 18.  
H.P.C. 17.  
1 Hawk.  
P.C. c. 17.  
§ 47.

It has been holden, that the wounding of one of the officers mentioned in this clause, while he is in the execution of his office, is not high treason, unless death ensue.

By the 7 *Ann. c. 21. § 8.* it is enacted, "That if any person shall slay any of the Lords of the Session, or of the Lords of Justiciary, sitting in judgment in the exercise of their office within *Scotland*, the doing thereof shall be construed, adjudged, and taken to be high treason."

### (M) Of extolling or maintaining the Power of the See of *Rome*.

BY the 5 *El. c. 1. § 2.* it is enacted, "That if any person or persons, inhabiting or resident within this realm, or within any other part of the queen's dominions, after the first day of *April* one thousand five hundred and sixty-three, shall by writing, cyphering, printing, preaching, or teaching, advisedly and wittingly extol, maintain, or defend, the authority, jurisdiction, or power of the Bishop of *Rome*, heretofore claimed, used, or usurped, within this realm, or in any country under the queen's obedience; or by any speech, open deed, or act, advisedly and wittingly attribute any such jurisdiction, authority, or pre-eminence, to the said see of *Rome*, or to any bishop of the same, within this realm, or in any the queen's dominions; that then every such person or persons, so offending, shall incur the dangers, penalties, pains, and forfeiture of the statute of *premunire*."

And by § 10. it is enacted, "That if any such offender, after such conviction and attainder as is aforesaid, do afterwards commit or do the said offences, or any of them, in manner and form aforesaid, and be thereof duly convicted and attainted, he shall, for the second offence, forfeit and suffer as in cases of high treason."

Dyer, 282.

It has been holden, that if a man write a book in defence of the pope's jurisdiction within this realm, and afterwards publish it, he is liable to the penalties of this statute.

*Ibid.*

It has been also holden, that if one man, knowing the purport of a book of this kind which was written beyond the seas, bring it over, and secretly sell it, and another, having read or heard the contents thereof, commend it, they are both liable to the penalties of this statute.

*Ibid.*

But, if a man, who has heard the contents of such a book, only buy and read it, he is not liable to the penalties of this statute.

Sav. 46.  
Slade's case.

A defendant, who had been convicted of an offence against this statute, and had received judgment for the same, being asked by *Manwood*, Chief Baron, whether he were still of the same opinion? answered, that he was. It was holden, at a meeting of the judges, that by this answer he became guilty of *advisedly and wittingly* maintaining the pope's power a second time. But two of

of the judges were of opinion, that these words, which were spoken in answer to a question put by the Chief Baron, did not amount to a maintaining of the pope's power *advisedly and willingly* a second time.

# (N) Of refusing a second Time to take the Oath of Supremacy.

BY the 1 *El. c. 1. § 19.* it is enacted, "That every archbishop, bishop, and every other ecclesiastical person, officer, and minister; and every temporal judge, justice, mayor, and every other temporal officer and minister, and every other person receiving your Highness's fee or wages, within this realm, or any your Highness's dominions, shall take the oath of supremacy therein set forth."

By § 20. it is enacted, "That if any such person shall obstinately refuse to take the same, he shall forfeit, during his life, every spiritual promotion, benefice and office, and every temporal promotion and office, which he hath solely at the time of such refusal."

By the 5 *El. c. 1. § 5.* it is enacted, "That all persons who shall take holy orders, or who shall be promoted to any degree of learning in any university, within this realm, or the dominions to the same belonging; all schoolmasters or teachers of children; all benchers, readers, utter barristers and ancients, in any house of court; all principal treasurers, and such as be of the grand company of every inn of Chancery; all attornies, prothonotaries, and filazers; all sheriffs, escheators, and feodaries; and all other persons, which shall take upon them or be admitted to any office in the law; and all officers and ministers of any court whatsoever; and every of them, shall take the oath of supremacy, set forth in the 1 *El. c. 1.* intituled, *An act restoring to the crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same*, before he shall be admitted to take upon him to use, exercise, supply, or occupy any such vocation, office, degree, ministry, room, or service, in the open court whereunto he shall belong; and if he shall not belong to any open court, then in an open place before a convenient assembly to witness the same, and before such person or persons, as shall have authority, by common use or otherwise, to admit such person to such vocation, office, degree, ministry, room, or service; or else before such person or persons, as by the queen's Highness, her heirs or successors, by commission under the great seal shall be named and assigned."

By § 6. it is enacted, "That every archbishop and bishop shall have power to tender the said oath to every spiritual and ecclesiastical person within his diocese."

By § 7. it is enacted, "That the Lord Chancellour or Keeper of the Great Seal for the time being shall and may, at all times  
" hereafter,

“ hereafter, direct a commission under the great seal to any person or persons, giving them thereby authority to tender the said oath to such person or persons, as by the said commission the said commissioners shall be authorized to tender the same unto.”

By § 8. it is enacted, “ That if any person appointed or compellable by this act, or by the act made in the said first year, to take the said oath, to whom the said oath by such commission shall be appointed to be tendered, shall at the time of the said oath so tendered refuse to take the same, the party so refusing shall incur the dangers, penalties, pains, and forfeitures of the statute of *præmunire*.”

And by § 11. it is enacted, “ That if any of the said persons do, after the space of three months after the first tender of the said oath, the second time refuse to take the same, in form as aforesaid to be tendered, every such offender shall for the same second offence suffer the same pains, judgment, and execution as is used in cases of high treason.”

But by § 17. it is provided, “ That this act shall not extend to compel any temporal person above the degree of a baron to take the said oath.”

And by § 20. it is provided, “ That no person shall be compelled, by virtue of this act, to take the said oath at the second time of tendering the same, except the same person shall be an ecclesiastical person, that shall have charge, cure, or office in the church, or any office or ministry in any ecclesiastical court of this realm; or such person as shall wilfully refuse to observe the orders and rites for divine service, that be authorized to be used and observed in the church of *England*, after that he shall be publicly admonished by the ordinary, or some of his officers for ecclesiastical cases, to keep and observe the same; or such person as shall openly and advisedly deprave by words, writings, or open facts, any of the rites and ceremonies authorized to be used in the church of *England*; or such person as shall say or hear the private mass prohibited by the laws of this realm.”

By the 1 *W. & M. ft.* 1. c. 8. § 2. all former statutes, so far as they concern the oath of supremacy, are repealed, and the said oath is abrogated.

But by § 2. it is enacted, “ That all persons (other than such concerning whom provision shall be made in this act, or in any other act of this session of parliament) who shall hereafter be admitted into any office or employment, ecclesiastical or civil, or come into any capacity, in respect or by reason whereof they should have been obliged, by any statute, to take the said abrogated oath, shall take the oaths by this act required to be taken, in such manner, at such times, before such persons, and in such courts and places, as they ought to have taken the said oath in case the same had not been abrogated: and that every such person, who shall neglect or refuse to take the same, shall incur and be liable to the same penalties, forfeitures, disabilities,



“ disabilities and incapacities, as by any such statute were appointed for or upon neglect or refusal to take the said oath.”

By this statute every person, who was before obliged to take the oath of supremacy, is obliged to take the oaths by this act appointed to be taken; and is, in case of refusal, rendered liable to the same *penalties, forfeitures, disabilities, and incapacities*, as he was before liable to, for refusing to take the oath of supremacy.

But as it is not said, that he shall suffer the same pains, judgment, and execution, as is used in cases of high treason, which are the words of the 5 *Eliz. cap. 1.* or that he shall suffer as in cases of high treason, which are the words generally made use of in statutes making offences high treason, it may be fairly inferred, that the refusing a second time to take the oath of supremacy has not, since the making of the 1 *W. & M. §. 3. c. 8.* been high treason.

It is moreover provided by the 5 *El. c. 2. § 10.* “ That this act, or any thing therein contained, or any attainder to be had by virtue of this act, shall not extend to make any corruption of blood, the disinheriting of any heir, forfeiture of dower, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his or their natural lives only.”

But there is not such a provision in the 1 *W. & M. §. 1. cap. 8.*

The consequence would be, that, if a second refusal to take the oaths by the latter act required to be taken in lieu of the abrogated oath of supremacy were at this day high treason, the punishment of such offence would be more severe, than it was before the making of the 1 *W. & M. §. 1. c. 8.* which is contrary to the spirit of that statute, and of the time in which it was made.

### (O) Of putting a Popish Bull in Ure.

BY the 13 *Eliz. c. 2. § 3.* it is enacted, “ That if any person shall obtain from the bishop of *Rome*, or any of his successors, any bull, writing, or instrument; or shall publish or put in ure any such bull, writing, or instrument; that every such offence shall be deemed and adjudged to be high treason.”

By the same *section* it is enacted, “ That the procurers, abettors, and counsellors, to the committing of the said offences, shall suffer as in cases of high treason.”

And by § 4. it is enacted, “ That every aider, comforter, or maintainer, of any offender against this act, after the committing of any of the said offences, shall incur the pains and penalties of the statute of *præmunire*.”

(P) Of reconciling any Person, or being reconciled, to the See of *Rome*.

BY the 23 *Eliz. c. 1. § 1.* after reciting that since the statute made in the thirteenth year of the reign of the queen, for preventing the putting of popish bulls in ure, divers evil-affected persons have practised other means than by bulls, to withdraw the queen's subjects from their natural obedience to her majesty, to obey the usurped authority of the see of *Rome*, it is enacted, "That if any person shall have, or pretend to have power, or shall by any means put in practice, to absolve, persuade, or withdraw, any of the queen's subjects, or any within her realms, from their natural obedience to her majesty; or to withdraw any of them, for that intent, from the religion now established to the *Romish* religion; or to move any of them, to promise any obedience to any pretended authority of the see of *Rome*, or of any other prince, state, or potentate, to be had or used within her dominions; or shall do any overt act, for that intent or purpose; that then every such person shall suffer as in cases of high treason."

And by the same *section* it is enacted, "That if any person shall, by any means, be willingly absolved or withdrawn as aforesaid, or willingly be reconciled, or shall promise any obedience to such pretended authority, prince, state, or potentate, as is aforesaid, that then every such person shall suffer as in cases of high treason."

By the same *section* it is enacted, "That the procurers and counsellors unto any of these offences shall suffer as in cases of high treason."

And by §. 3. it is enacted, "That any person, who shall wittingly be aider or maintainer of any person so offending, knowing the same, shall suffer as in cases of misprision of high treason."

Sav. 3. pl. 9.  
Campion's  
case.

It has been holden, that the bare pretending to absolve a subject from his natural allegiance, without an actual persuading him to withdraw the same; and that the actual persuading of a subject to withdraw his natural allegiance, without pretending to a power of absolving him, are both high treasons within the meaning of this statute.

By the 3 *Jas. 1. cap. 4. § 22.* it is enacted, "That if any person shall, either upon the seas or beyond the seas, or in any other place within the dominions of the king's majesty, his heirs or successors, put in practice to absolve, persuade, or withdraw any of the subjects of the king's majesty, or of his heirs and successors, from their natural obedience to his majesty, his heirs or successors; or to reconcile them to the see of *Rome*; or to move them, or any of them, to promise obedience to any pretended authority of the see of *Rome*, or to any other prince, state, or potentate; that then every such person shall suffer as in cases of high treason."

And

And by § 23. it is enacted, "That if any such person as aforesaid shall be, either upon the sea or beyond the seas, or in any other place, within the dominions of the king's majesty, his heirs or successors, willingly absolved, or withdrawn, as aforesaid; or willingly reconciled; or shall promise obedience to any such pretended authority, prince, state, or potentate; that every such person shall suffer as in cases of high treason."

But by § 24. it is provided, "That this last clause shall not extend to any person whatsoever, who shall be reconciled to the see of *Rome* as aforesaid (for and touching the point of being reconciled only) that shall return into this realm, and within six days after such return, before the bishop of the diocese, or two justices of the peace jointly or severally of the county where he shall arrive, submit himself to his majesty and his laws; and take the oath of supremacy, set forth by an act made in the first year of the reign of the late *Queen Elizabeth*, and also the oath of allegiance before set forth in this act."

By the 1 *W. & M. stat.* 1. *cap.* 8. § 2. all statutes, so far as they concern the oath of supremacy, are repealed, and the said oath is abrogated.

A person, who has been reconciled to the see of *Rome*, is, by the abrogation of the oath of supremacy set forth by the act made in the first year of *Queen Elizabeth*, prevented from complying literally with the terms of the proviso contained in the 3 *Ja.* 1. c. 4. § 24.

There could scarce have been a doubt, that the taking of the oaths, required by the 1 *W. & M. stat.* 5. c. 8. to be taken in the room of the oaths of supremacy thereby abrogated, would at this day answer every purpose, which the taking of the abrogated oath would heretofore have done.

But to remove all possibility of doubt as to this matter, it is by the 1 *W. & M. stat.* 1. c. 8. § 4. enacted, "That all persons (other than such concerning whom provision shall be made in this act, or in any other act of this session of parliament) who shall hereafter come into any capacity, in respect or by reason whereof they would have been obliged, by the said statutes, to take the said abrogated oath, shall take the oaths required by this act to be taken, in such manner, at such times, before such persons, and in such places, as they ought to have taken the said abrogated oath, in case the same had not been abrogated." [But see *stat.* 31 *G.* 3. c. 32.]

## (Q) Of receiving Popish Orders or Education.

BY the 27 *Eliz.* *cap.* 2. § 3. it is enacted, "That it shall not be lawful for any jesuit, seminary priest, or other priest, deacon, or religious or ecclesiastical person whatsoever, being born within this realm, or any other her highness's dominions, hereafter to be made, ordained, or professed, by any authority or jurisdiction derived, challenged, or pretended, from the see of *Rome*, by or of what name, title, or degree, soever the same shall" [See *stat.* 31 *G.* 3. c. 32. § 4.]

“ shall be called or known, to come into, be, or remain in any  
 “ part of this realm or any other her highness’s dominions, other  
 “ than in such special cases, and upon such special occasions  
 “ only, and for such time only, as is expressed in this act; and  
 “ if he do, that then every person so offending shall suffer as in  
 “ cases of high treason.”

By by § 10. it is provided, “ That this act shall not extend to  
 “ any such religious or ecclesiastical person beforementioned, as  
 “ shall within three days, after he shall come into this realm,  
 “ or any other her highness’s dominions, submit himself to some  
 “ archbishop or bishop of this realm, or to some justice of the  
 “ peace within the county where he shall arrive and land, and  
 “ do thereupon truly and sincerely, before the same archbishop,  
 “ bishop, or justice of the peace, take the oath of supremacy set  
 “ forth in an act made in the first year of her highness’s reign,  
 “ and by writing under his hand confess and acknowledge, and  
 “ from thenceforth continue, his due obedience to her Majesty’s  
 “ laws, statutes, and ordinances, made or to be made in causes  
 “ of religion.”

It is however by § 16. provided, “ That if any person, submit-  
 “ ting himself as aforesaid, do at any time, within the space of  
 “ ten years after such submission, come within ten miles of such  
 “ place where her majesty shall be, without special licence from  
 “ her majesty in writing under her hand; that then such person  
 “ shall take no benefit of his said submission, but the same shall  
 “ be void.”

Raym. 377.

Occallian’s  
 case.

1 Hawk.

c. 17. § 83.

It has been holden, that if a person, who comes within the  
 description of this statute, being in a ship with design to go to  
*Ireland*, be driven by a storm into *England* and immediately ap-  
 prehended, he is not guilty of high treason; for his design was  
 to go into *Ireland*; and such person can never be said to come  
 into, be, or remain in *England*, within the meaning of this  
 statute; because it happened, that he was forced into *England*  
 by the act of God, and was against his will detained there as a  
 prisoner.

By the 27 *Eliz. cap. 2. § 5.* it is enacted, “ That if any of her  
 “ majesty’s subjects, not being such a religious or ecclesiastical  
 “ person as is in this act beforementioned, who hereafter shall be  
 “ of or brought up in any college of jesuits or seminary already  
 “ erected and ordained, or hereafter to be erected and ordained,  
 “ in the parts beyond the seas, or out of this realm in any foreign  
 “ parts, shall not, within six months next after proclamation  
 “ made in that behalf in the city of *London* under the great seal  
 “ of *England*, return into this realm, and within two days next  
 “ after such return, before the bishop of the diocese, or two jus-  
 “ tices of the peace of the county where he shall arrive, submit  
 “ himself to her majesty and her laws, and take the oath of  
 “ supremacy set forth in an act made in the first year of her  
 “ reign; that then every such person, who shall otherwise return,  
 “ come into, or be in this realm, or any other her highness’s do-  
 “ minions, for such offence of returning into, or being in the  
 “ realm,

“ realm, or any other her Highness’s dominions, without submission as aforesaid, shall suffer as in cases of high treason.”

By the 1 *W. & M. stat. 1. cap. 8.* all statutes, so far as they concern the oath of supremacy, are repealed, and the said oath is abrogated.

But, as it has been before observed, in the case of being reconciled to the see of *Rome*, the taking of the oaths, required by the 1 *W. & M. stat. 1. cap. 8.* to be taken in lieu of the oaths of supremacy and allegiance thereby abrogated, does at this day answer every purpose which the taking the oath of supremacy would heretofore have done.

## (R) Of denying the Power of Parliament to limit the Succession of the Crown.

BY the 6 *Ann. cap. 7. § 1.* it is enacted, “ That if any person  
“ or persons shall maliciously, advisedly and directly, by writing or printing, maintain and affirm, that the kings or queens  
“ of this realm, with and by the authority of parliament, are not  
“ able to make laws and statutes, of sufficient force and validity  
“ to limit and bind the crown, and the descent, limitation, inheritance, and government thereof; every such person or persons shall suffer as in cases of high treason.”

## (S) Of affirming that a Person, not in the Succession as by Law established, hath any Right to the Crown.

BY the 6 *Ann. cap. 7. § 1.* it is enacted, “ That if any person  
“ or persons shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that our sovereign lady  
“ the Queen is not the lawful or rightful Queen of these realms;  
“ or that the pretended Prince of *Wales*, who now styles himself  
“ King of *Great Britain*, or King of *England*, by the name of  
“ *James* the Third, or King of *Scotland* by the name of *James* the Eighth, hath any right or title to the crown of these realms, or  
“ that any other person or persons hath or have any right or title  
“ to the same, otherwise than according to an act of parliament,  
“ made in *England* in the first year of the reign of their late  
“ Majesties King *William* and Queen *Mary* of ever blessed and  
“ glorious memory, intituled, *An act declaring the rights and liberties of the subject, and settling the succession of the crown*; and  
“ one other act, made in *England* in the twelfth year of the reign  
“ of his said late Majesty King *William* the Third, intituled, *An act for the further limitation of the crown, and better securing the rights and liberties of the subject*; and the acts lately made in  
“ *England* and *Scotland* mutually for the union of the kingdoms;  
“ every such person shall suffer as in cases of high treason.”

(T) Of endeavouring to hinder the Person, next in the Succession as by Law established, from succeeding to the Crown.

BY the 1 *Ann. st. 2. c. 17. § 3.* it is enacted, “ That if any  
 “ person or persons shall endeavour to deprive or hinder any  
 “ person, who shall be next in succession to the crown, according  
 “ to the limitations in an act, intituled, *An act declaring the rights*  
 “ *and liberties of the subject, and settling the succession of the crown ;*  
 “ and according to one other act, intituled, *An act for the further*  
 “ *limitation of the crown, and better securing the rights and liberties*  
 “ *of the subject,* from succeeding after the decease of her ma-  
 “ jesty to the imperial crown of this realm, and the dominions  
 “ and territories thereunto belonging, according to the limitations  
 “ in the before-mentioned acts ; and the same maliciously, ad-  
 “ visedly, and directly, shall attempt by any overt act or deed,  
 “ every such offence shall be adjudged high treason.”

(U) Of corresponding with the Pretender, or one of his Sons.

BY the 13 *W. 3. c. 3.* it is enacted, “ That if any of the sub-  
 “ jects of the crown of *England* shall, within this realm or  
 “ without, hold, entertain, or keep, any intelligence or corres-  
 “ pondence, in person or by letters, messages, or otherwise,  
 “ with the pretended Prince of *Wales*, or with any person or per-  
 “ sons employed by him, knowing such person to be so employed,  
 “ or shall, by bill of exchange or otherwise, remit or pay any  
 “ sum or sums of money for the use or service of the said pre-  
 “ tended Prince of *Wales*, knowing such money to be for such  
 “ use or service ; such person so offending shall be taken, deemed,  
 “ and adjudged to be guilty of high treason.”

By the 17 *Geo. 2. c. 39. § 1.* after reciting, that the eldest son of the pretender is lately arrived in the *French* dominions, and hath been received and encouraged by the *French* King, it is enacted, “ That if any of the subjects of the crown of *Great Bri-*  
 “ *tain* shall, within this realm or without, hold, entertain, or  
 “ keep any intelligence or correspondence, in person, or by let-  
 “ ters, messages, or otherwise, with the eldest or any other son or  
 “ sons of the said pretender, or with either or any of them, or  
 “ with any person or persons employed by the said eldest or other  
 “ son or sons of the said pretender, or by either or any of them,  
 “ knowing such person to be so employed ; or shall, by bill of  
 “ exchange or otherwise, remit or pay any sum or sums of money  
 “ for the use or service of the said eldest or other son or sons of  
 “ the said pretender, or of either or any of them, knowing such  
 “ money to be for such use or service ; such person so offending  
 “ shall be taken, deemed, and adjudged to be guilty of high trea-  
 “ son.”

## (W) Of corresponding or treating with a Rebel or Enemy.

BY the 2 & 3 *Ann. c. 20. § 34.* after reciting, that there is not any effectual provision made, for the government of her majesty's land forces out of the realm of *England* and *Ireland*, it is enacted, "That if any officer or foldier in her majesty's army shall, either upon land out of *England*, or upon the sea, hold correspondence with any rebel or enemy of her majesty, or give them advice or intelligence, either by letters, messages, signs, or tokens, or in any way whatsoever, or shall treat with such rebels or enemies, or enter into any condition with them, without her majesty's licence, or licence of the general, lieutenant-general, or chief commander; that then every person so offending shall suffer as in cases of high treason."

## (X) Of Petit Treason in the general.

DIVERS offences were heretofore petit treason, which are not so at this day; as piracy by a subject; a discovery of the king's counsel by one of the grand jurors; an attempt by a wife to kill her husband.

3 *Inst. 20.*  
1 *Hawk.*  
*P. C. c. 32.*

By the 25 *Ed. 3. §. 5. c. 2.* after declaring the slaying of a master by his servant, the slaying of a husband by his wife, and the slaying of a prelate by an ecclesiastick, who oweth faith and obedience to the prelate, to be treasons, it is declared, "That because many other cases of the like treason may happen in time to come, which a man can cannot think of or declare at present, if any other case, supposed to be treason, which is not specified above, doth hereafter happen before any one of the justices, such justice shall not proceed to judgment of treason, until the case be laid before the king in parliament, and it is declared, whether it ought to be adjudged a treason or other felony."

It does not appear, that any offence was, in consequence of the power given by this clause, declared in parliament to be petit treason.

And by the 1 *Mar. §. 1. c. 1. § 3.* it is enacted, "That no act or offence shall be taken, had, deemed, or adjudged to be petit treason, but only such as be declared and expressed to be petit treason in or by the act of parliament, made in the twenty-fifth year of the reign of the most noble king of famous memory *Edward* the Third, touching or concerning treasons or the declarations of treasons."

As no offence has been, by any statute subsequent to the 1 *M. §. 1. c. 1.* made petit treason, it follows, that no offence is, at this day, petit treason, unless it be one of those which are, by the 25 *Ed. 3. §. 5. c. 2.* declared to be so.

Plowd. 86. No offence is to be adjudged petit treason, unless it be clearly  
 3 Inst. 12. and without argument or inference within the meaning of the  
 81. 25 Ed. 3. *ff.* 5. c. 2. for a statute declaring an offence to be trea-  
 18 Eliz. son ought not to be extended by equity.  
 c. 1. f. 1.

H. P. C. 24. As petit treason implies murder, it follows, that, if the killing  
 1 Hawk. of a master, husband, or prelate be not attended with such cir-  
 P. C. c. 32. cumstances as would have made it murder in the case of killing  
 § 6. any other person, the offence is not petit treason.

1 H. H. P. C. If, upon an indictment for petit treason, the killing appear to  
 378. have been upon such sudden provocation, that the offence would,  
 in case the killing had been by a stranger to the person killed,  
 have amounted only to manslaughter, the jury may find the of-  
 fender guilty of manslaughter only.

3 Inst. 20, There may be an accessory, either before or after the fact, in  
 21. 138. petit treason.

At the common law an accessory to petit treason, either before  
 or after the fact, was entitled to the benefit of the clergy.

But by the 4 & 5 *Phil. & Mar. c.* 4. § 1. the benefit of the  
 clergy is taken away from an accessory before the fact, it being  
 thereby enacted, "That if any person shall maliciously com-  
 mand, hire, or counsel any person to commit any petit treason,  
 every such offender shall not have the benefit of clergy."

The distinction of high and petit treason did never exist in the  
 law of *Scotland*: for every offence, which was by the law of *Eng-  
 land* petit treason, was, by the law of *Scotland*, treason.

At this day an offence, which is in *England* petit treason, is  
 in *Scotland* only a capital offence; it being, by the 7 *Ann. c.* 21.  
 § 7. enacted, "That murder under trust, which was, by the law  
 of *Scotland*, treason, shall, for the time to come, be only ad-  
 judged and deemed to be a capital offence."

## (Y) Of slaying a Husband by his Wife.

IT is, by the 25 Ed. 3. *ff.* 5. c. 2. declared to be petit treason,  
 "When a wife slayeth her husband."

§ H. H. P. C. If *A.*, who is married to *B.*, do, during the life of *B.*, marry  
 381. *C.*, the latter woman, although she be, to some purposes, a wife  
*de facto*, yet she is not a wife within the meaning of this statute;  
 because the second marriage was *ipso facto* void.

*Ibid.* If a woman, after having been divorced *causâ adulterii vel sa-  
 vitie*, murder the man from whom she is divorced, this is petit  
 treason; for, as a divorce for either of these causes does not dis-  
 solve the marriage, she continues to be a wife.

*Ibid.* But a woman, who has been divorced *causâ consanguinitatis vel  
 præcontractus*, cannot be guilty of petit treason; because the mar-  
 riage is dissolved by a divorce for either of these causes.

3 Inst. 20. If a wife and a stranger are both principals in the murder of  
 H. P. C. 25. her husband, the wife is guilty of petit treason; but the stranger  
 1 Hawk. is only guilty of murder.  
 P. C. c. 32.



If a wife, who has procured a stranger to murder her husband, be by agreement with the stranger in the house wherein the murder is committed, the wife, although she were not in the room at the time of committing it, is guilty of petit treason: for, as the stranger is in such case encouraged, by the expectation of having her immediate assistance in case the same should be wanted, to commit the murder, she is, in judgment of law, as much a principal as if she stood by with a weapon in her hand ready to assist.

Moor, 91.  
H. P. C. 25.  
1 Hawk.  
P. C. c. 32.

If a wife have procured a servant to murder his master, she, although the fact be perpetrated in her absence, is an accessory to petit treason.

3 Inst. 20.  
H. P. C. 25.  
1 Hawk.  
P. C. c. 32.

But, if a wife, who has procured a stranger to murder her husband, be absent when the fact is perpetrated, she is only an accessory to murder: for the principal is only guilty of murder: and the maxim is, that *accessorius sequitur naturam sui principalis*.

3 Inst. 20.  
139.  
H. P. C. 24,  
25.  
1 H. P. C.  
379.  
1 Hawk. P. C. c. 32.

If a wife murder her husband by the procurement of a stranger, the stranger is an accessory to petit treason.

1 Hawk.  
P. C. c. 32.

### (Z) Of slaying a Master by his Servant.

BY the 25 *Ed. 3. st. 5. c. 2.* it is declared to be petit treason, "When a servant slayeth his master."

The murder of his mistress, or of his master's wife, by a servant, has been adjudged petit treason; for, although neither of these cases is within the letter of the statute, both of them are clearly within the meaning thereof; inasmuch as the word master signifies any person, to whom another stands related as servant.

3 Inst. 20.  
Plowd. 86.  
1 Hawk.  
P. C. c. 32.

If a child murder his father or mother, this, although it be a much more heinous offence, is not petit treason; because it is not a case provided against by this clause; and the judges are restrained by another clause in the 25 *Ed. 3. st. 5. c. 2.* from interpreting this statute *a simili*, or *a minore ad majus*.

Plowd. 86.  
3 Inst. 20.  
22, 23.  
H. P. C. 24.  
1 Hawk.  
P. C. c. 32.

But, if a child, who serves his father or mother for meat, drink, clothes, or wages, murder his father or mother, this is petit treason; for such child is to be considered as a servant.

3 Inst. 20.  
H. P. C. 24.  
1 Hawk.  
P. C. c. 32.

A servant, after having quitted his service a year, murdered the person who had been his master. This was adjudged to be petit treason; because it appeared, that the murder was in consequence of malice conceived against the master, while the servant was in his service.

Bro. Coron.  
116.  
Plowd. 206.  
3 Inst. 20.  
H. P. C. 23.  
1 Hawk.  
P. C. c. 32.

It has been already shewn, in treating of that species of petit treason which consists in the slaying of a husband by his wife, in what cases the wife is a principal in, or an accessory to, petit treason, or a principal in, or an accessory to, murder. It is in this place, therefore, sufficient to say, without repeating what is there said, that any circumstance, which would, in the case of slaying a husband

husband by his wife, have made her so, does, in the case of slaying a master by his servant, make the servant a principal in, or an accessory to, petit treason, or a principal in, or an accessory to murder.

(Aa) Of slaying a Prelate by an Ecclesiastick, who oweth Faith and Obedience to the Prelate.

BY the 25 *Ed. 3. st. 4. c. 2.* it is declared to be petit treason, “ When a man, secular or religious, slayeth his prelate, to whom he oweth faith and obedience.”

<sup>1</sup> H. H. P. C. 381. If an ecclesiastick, who enjoys a benefice in the diocese of *A.*, within the province of *B.*, murder the archbishop of the province of *B.*, this, although the archbishop be not the immediate superior of such ecclesiastick, seems to be petit treason.

*Ibid.* If an ecclesiastick hold two benefices in two dioceses, it is petit treason to murder the bishop of either diocese; because a canonical obedience is due to the bishops of both dioceses.

*Ibid.* It is laid down, that if an ecclesiastick slay the bishop who ordained him, this is petit treason, although he do not enjoy a benefice or cure of souls within the diocese of such bishop; because he promised, at his ordination, a canonical obedience to him.

It has been already shewn, in treating of that species of petit treason which consists in the slaying of a husband by his wife, in what cases the wife is a principal in, or an accessory to, petit treason, or a principal in, or an accessory to, murder. It is in this place, therefore, sufficient to say, without repeating what is there said, that any circumstance, which would, in the case of slaying a husband by his wife, have made her so, does, in the case of slaying a prelate by an ecclesiastick, who owes faith and obedience to him, make the ecclesiastick a principal in, or an accessory to, petit treason, or a principal in, or an accessory to, murder.

(Bb) Of the Indictment of Treason.

H. P. C. 204. IT is in the general true, that grand jurors can only inquire of such offences as arise within the county for which they are returned.

But by the 28 *H. 8. c. 15. § 1.* it is enacted, “ That all treasons, hereafter to be committed in or upon the sea, or in any place where the admiral or admirals have, or pretend to have jurisdiction, shall be inquired of in such shires and places in the realm, as shall be limited by the king’s commission to be directed for the same, in like form and condition as if any such offence had been committed in or upon the land.”

H. P. C. 15. 203. At the common law treason committed out of the realm could only be inquired of in the county where the offender had land.

But by the 35 *H. 8. c. 2. § 1.* it is enacted, “ That all treasons, hereafter committed by any person or persons out of this realm

“ realm of *England*, shall be from henceforth inquired of before  
 “ the king’s justices of his bench for pleas to be holden before  
 “ himself, by good and lawful men of the same shire where the  
 “ said bench shall sit; or else before such commissioners, and in  
 “ such shire of the realm, as shall be assigned by the king’s ma-  
 “ jesty’s commission, and by good and lawful men of the same  
 “ shire; in like manner and form, to all intents and purposes, as if  
 “ such treasons had been committed within the same shire where  
 “ they shall be so inquired of.”

The construction seems to have been, that this act extends only to such offences as were, at the time of making it, treason; for, in divers subsequent statutes, by which other offences are made treasons, there is a provision for the case of their having been committed out of the realm.

By the 13 *W. 3. c. 3. § 43.* it is enacted, “ That where any  
 “ of the offences, by this statute made high treasons, shall be com-  
 “ mitted out of this realm, the same may be inquired of in any county  
 “ of this kingdom of *England*.”

By the 2 & 3 *Ann. c. 20. § 36.* it is enacted, “ That all  
 “ the offences, by this statute made high treasons, which shall be  
 “ committed upon land out of *England*, or upon the sea, may be  
 “ inquired of in the court of Queen’s Bench, by good and lawful  
 “ men of the same county where the said court shall sit; or be-  
 “ fore such commissioners, and in such county of this realm, as  
 “ shall be assigned by the queen’s majesty, and by good and law-  
 “ ful men of the same county; in manner and form, to all in-  
 “ tents and purposes, as if the said treasons had been committed  
 “ within the same county.”

By the 7 *Ann. c. 21. § 5.* it is enacted, “ That all treasons,  
 “ which, after the first day of *July* one thousand seven hundred  
 “ and nine, shall be committed by any native of *Scotland* upon the  
 “ high sea, or in any place out of this realm of *Great Britain*,  
 “ shall be inquired of in such shire, stewarty, or county of *Great*  
 “ *Britain*, as shall be assigned by the queen’s commission, in like  
 “ manner, as if such treasons had been committed in the same  
 “ shire where they shall be inquired of as aforesaid.”

By the 17 *Geo. 2. c. 39. § 4.* it is enacted, “ That where any  
 “ of the offences, by this statute made high treasons, shall be com-  
 “ mitted out of this realm, the same may be alleged, laid, and in-  
 “ quired of in any county of that part of *Great Britain* called  
 “ *England*, or in any shire or stewarty in that part of *Great Bri-*  
 “ *tain* called *Scotland*.”

By the 7 *W. 3. c. 3. § 6.* it is enacted, “ That no person or  
 “ persons shall be indicted or prosecuted for any high treason,  
 “ whereby any corruption of blood may be made, that shall be  
 “ committed or done within the kingdom of *England*, dominion  
 “ of *Wales*, or town of *Berwick upon Tweed*, unless the indict-  
 “ ment be found within three years next after the treason done or  
 “ committed.”

But by § 7. it is provided, “ That if any person or persons  
 “ shall be guilty of designing, endeavouring, or attempting any  
 “ assassination

“ assassination of the king, by poison or otherwise, such person or persons may be prosecuted at any time, notwithstanding the aforefaid limitation.”

By the 8 & 9 *W. 3. c. 26. § 4.* it is enacted, “ That no prosecution shall be, for any offence against this act, *which was made for better preventing the counterfeiting of the current coin of this kingdom*, unless such prosecution be commenced within three months after such offence committed.”

But by the 7 *Ann. c. 25. § 2.* it is enacted, “ That the prosecution of such person or persons, as offend against the statute made in the eight and ninth year of his late majesty’s reign, intituled, *An act for better preventing the counterfeiting of the current coin of this kingdom*, by making or mending, or beginning to make or mend, any coining tool or instrument therein prohibited; or by marking money round the edges, with letters or grainings; may be commenced at any time within six months after such offence committed; any thing in the said act to the contrary notwithstanding.”

By the 1 *Ed. 6. c. 12. § 22.* it is enacted, That no person or persons shall be indicted, arraigned, or condemned, for any offence of treason; unless the same offender be accused by two sufficient and lawful witnesses; or shall willingly without violence confess the same.”

And by the 5 *Ed. 6. c. 11. § 12.* it is enacted, “ That no person or persons, after the first day of *June* next coming, shall be indicted for any treasons that now be or hereafter shall be, which shall be perpetrated, committed, or done, unless the same offender or offenders be thereof accused by two lawful accusers.”

7 Inst. 26.  
Kel. 26.

Some judges have been of opinion, that both these statutes are virtually repealed by the 1 & 2 *Ph. & M. c. 10.* it being thereby enacted, “ That all trials hereafter to be had, awarded, or made, for any treason, shall be had and used according to the course of the common law of this realm, and not otherwise.”

3 Inst. 25,  
26.

But *Coke*, Chief Justice was of opinion, that the latter statute relates only to the trial of treason, and not to the finding of an indictment for treason.

This opinion was in part founded on the two following reasons, which seem to be conclusive.

3 Inst. 27.

The word *awarded* used in the 1 & 2 *Ph. & M. c. 10.* is only applicable to a trial; for an indictment cannot with any degree of propriety be said to be awarded.

3 Inst. 26.

If the indictment had ever been considered as part of the trial, it must, as that statute directs that every peer of the realm shall be tried by his peers, in the case of a peer of the realm, always have been found by peers: but the practice has been constantly otherwise.

3 Inst. 25,  
26.

It may be inferred, from a clause in the 1 & 2 *Ph. & M. c. 10.* by which one witness is declared to be sufficient, for the finding of a bill of indictment for some high treason particularly mentioned, that two are necessary for the finding of a bill for any other high treason.

By

By the 7 W. 3. c. 3. § 2. it is enacted, " That no person shall be indicted of high treason, whereby any corruption of blood may be made, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; any law, statute, or usage to the contrary notwithstanding."

But by § 13. it is provided, " That this act shall not extend to any indictment for counterfeiting his majesty's coin, or his great seal, privy seal, privy signet, or sign manual," and consequently one witness is sufficient for the finding of an indictment for one of these offences.

In an indictment for an offence declared to be treason by the 25 Ed. 3. ft. 5. c. 2. the treason must be charged in the very words of that statute. Cro. Car. 125. Pine's case.

Nay, so strict has been the adherence to the words of this statute, that where the king had been actually killed, the killing was not laid as the treason: but the compassing of his death was laid as the treason, and the killing as an overt act. Kel. 8. The case of the Regicides. 1 Hawk. P. C. c. 17. § 2.

Every high treason must be laid to have been committed *proditoriè*. Carth. 319. Tucker's case. 3 Inst. 15. H. P. C. 11. Salk. 635.

It has been said, that it is not necessary, in an indictment for high treason, to charge an overt act in any other species of treason except that of compassing or imagining the king's death. 5 Stat. Tr. 24. Vaughan's case.

But the better opinion is, that as the words in the 25 Ed. 3. ft. 5. c. 2. *and thereof be probably attainted of overt act*, do as well relate to the high treason of violating certain personages; to that of levying war against the king; and to that of adhering to the king's enemies; as to that of compassing or imagining the king's death; an overt act must in every one of these treasons be laid. 3 Inst. 14. H. P. C. 13. 1 Hawk. P. C. c. 17. § 29. Salk. 634. 5 Stat. Tr. 21, 22.

It is not necessary, that an overt act be laid to have been done *proditoriè*; because the overt act is not laid as the treason, but as the evidence thereof. Salk. 633. Cranburn's case.

It is sufficient, to lay a consultation to kill the king as an overt act of compassing or imagining his death, without laying the manner in which the king's death was to have been brought about; for the consultation is in itself an overt act. 4 Stat. Tr. 710, 711. Lowick's case. Kel. 15.

It must be shewn in an indictment for adhering to the king's enemies, to whom and at what time the adherence was, that the court may judge, whether the persons alleged to have been adhered to were at the time of adhering enemies of the king. 2 Vent. 316. Harding's case.

But it is not necessary to allege in such indictment, that the adhering was against the king; for this shall be intended. 5 Stat. Tr. 36. Vaughan's case. 1 Hawk. P. C. c. 17. § 28.

In an indictment, wherein the overt act laid is the speaking of treasonable words, it must be alleged, that the words spoken related to the king. 2 Show. 411.

MS. Rep.  
Anon. Hil.  
23 W. 3.

It was holden by all the judges, that it must be shewn in an indictment for coining, that the person indicted was not within any of the exceptions mentioned in the enacting clause of the statute made in the eighth and ninth years of the reign of *William the Third*, intituled, *An act for better preventing the counterfeiting of the current coin of this kingdom*; and the judgment was arrested, because this was not shewn.

*Sid.*

But it was in this case holden, that another indictment would lie; and the party, in whose favour the judgment had been arrested, was afterwards convicted upon another indictment, and executed.

1 Hawk.  
P. C. c. 17.  
§ 82.

It need not be alleged, in an indictment for receiving popish orders, in what place the person indicted was born; or in what place he was ordained: it being sufficient to allege in the words of the statute, by which this offence is made high treason, *that such person was born in this realm, or in the king's dominions; and was made, ordained, or professed, by an authority or jurisdiction derived, challenged, or pretended, from the see of Rome.*

Kel. 15.  
The case of  
the Regi-  
cides.

It has been said, that as every overt act of compassing the king's death is transitory, an overt act of this species of high treason need not be laid in the county, wherein the treason is charged to have been committed.

6 Stat. Tr.  
319.  
Layr's case.  
Fost. 10.

But it seems to be the better opinion, that an overt act, as well of this species of high treason as of every other, must be laid in the county wherein the treason is charged to have been committed; and that no evidence can be given of an overt act in any other county, until the overt act, laid in the county wherein the treason is charged to have been committed, has been proved.

Carth. 318,  
318.  
Tucker's  
case.  
Salk. 631.  
S. C.  
Ld. Raym. 1.  
S. C.

In an indictment, whether it be against a natural-born subject, or an alien, for an offence declared to be high treason by the 25 *Ed. 3. §. 5. c. 2.* it must be expressly alleged, that the offence was *contra ligeantiae suae debitum*; for as this statute does not make any offence high treason, it being only declaratory of what offences were so at the common law, every offence, thereby declared to be high treason, continues to be, as it was at the common law, an offence against that allegiance which is due to the king from every person who lives under his protection.

Salk. 631.  
Tucker's  
case.

But it is not necessary to allege, in an indictment for an offence made high treason by a statute subsequent to the 25 *Ed. 3. §. 5. c. 2.* that the offence was *contra ligeantiae suae debitum*; it being sufficient to allege that the offence was *contra formam statuti.*

Fost. 186.

It is said to be the better opinion, that it is not necessary to allege, in any indictment for high treason, that the offence was *contra naturalem suum dominum*, or *contra naturalis suae ligeantiae debitum*; and it is added, that it is the safer way, even in an indictment against a natural-born subject to allege, that the offence was *contra ligeantiae suae debitum.*

7 Rep. 7.  
Calvin's  
case.  
4 Stat. Tr.  
688.

If it be alleged, in an indictment against an alien for high treason, that the offence was *contra naturalem suum dominum*, or *contra naturalis ligeantiae suae debitum*, the indictment is bad; for, although

although a local allegiance be due from an alien to the prince under whose protection he lives, a natural allegiance is not due from him.

By the 7 *W. 3. c. 3.* § 9. it is enacted, “ That no indictment “ for high treason, whereby corruption of blood may be made, “ nor any process or return thereupon, shall be quashed on the “ motion of the prisoner or his counsel, for mis-writing, mis- “ spelling, or false or improper Latin, unless exception concern- “ ing the same shall be made, in the court where such indictment “ shall be tried, by the prisoner or his counsel assigned, before any “ evidence is given in open court upon the indictment.”

The construction hath been, that exceptions grounded on the errors mentioned in this statute, must be taken before plea pleaded; and in *Vaughan's* case, in *Sullivan's* case, and in *Layer's* case, the court refused to hear such exceptions after pleading. It is true, that in *Cranburn's* case, the court did permit such exceptions to be taken after pleading, and in *Rookwood's* after the jury were sworn: but it ought to be remembered, that these were indulgencies to the prisoners upon a new statute, and before the practice was settled to the contrary, as it now is. Fost. 231.

By the 7 *Ann. c. 21.* § 1. and § 3. it is enacted, “ That all “ high treasons, hereafter committed within *Scotland*, shall be “ inquired of in *Scotland*, in such manner as is used in *Eng- “ land*.”

If a wife join with a stranger in murdering her husband, they may both be indicted in the same indictment; for as the charge in the indictment is, that *felonice, proditorie, & ex malitia præcogitata* *murdraverunt*, the indictment is good as to both, *reddendo singula singulis*, and consequently the wife may be found guilty of petit treason, and the stranger of murder. Fost. 329.

## (Cc) Of the Trial of Treason.

AT the common law, courts of Admiralty claimed an exclusive jurisdiction of all offences committed in or upon the sea. 3 Inst. 11.

But by the 28 *H. 8. c. 15.* § 1. it is enacted, “ That all trea- “ sons hereafter to be committed in or upon the sea or in any “ place where the admiral or admirals have or pretend to have ju- “ risdiction, shall be heard and determined in such shires and “ places in the realm, as shall be limited by the king's commis- “ sion, to be directed for the same in like form and condition, as “ if any such offence had been committed or done in or upon “ the land.”

At the common law, high treason committed out of the realm could only be tried in the county wherein the offender had land. H. P. C. 15. 203.

The clauses of the different statutes, by which it is enacted, that high treason committed out of the realm may be inquired of in any *English* or *Scotch* county, have been already mentioned.

It is sufficient to say in this place, without repeating those clauses, that in every one of them it is enacted, that high treasons committed

committed out of the realm may be heard and determined in the county wherein it may be inquired of.

By the 33 *H. 8. c. 23. § 1.* it is enacted, " That if any person or persons, being examined by the king's council, or three of them, upon any manner of treason, do confess any such offence, or the said council, or three of them, upon such examination shall think any person so examined to be vehemently suspected of any treason; that then in every such case, by the king's commandment, his majesty's commission of *oyer* and *terminer* shall be made to such persons, and into such shires and places, as shall be named and appointed by the king's highness, for the speedy trial, conviction, or delivery of such offenders."

3 *Inft. 27.* This statute is virtually repealed by the 1 & 2 *Ph. & M. c. 10.* by which it is enacted, " That all trials of treason shall be according to the course of the common law of this realm, and not otherwise."

Dyer, 286. If a bill of indictment of high treason have been found in the county wherein the offence was committed, it may be removed into the court of King's Bench, and the offender may be tried there.

3 *Inft. 27.* The person indicted of high treason in the proper county may be tried in a foreign county, before commissioners appointed by a special commission; for this is warranted by the course of the common law.

3 *Inft. 27.* But the jurors must, in such case, be of the county wherein the offence was committed; because this is required by the common law.  
H. P. C. 234.

3 *Inft. 27.* If a man be indicted of high treason, he may, at this day, as he might have done at the common law, plead a foreign plea, and be tried in the foreign county: but a foreign plea cannot be pleaded to an indictment for petit treason.

By the 7 *W. 3. c. 3. § 1.* it is enacted, " That every person that shall be indicted for high treason, whereby any corruption of blood may be made, shall have a true copy of the whole indictment, but not the names of the witnesses, delivered to him five days at the least before he shall be tried for the same, whereby to enable him to advise with counsel thereupon, to plead and make his defence, his attorney or agent requiring the same, and paying the officer his reasonable fee for writing thereof, not exceeding five shillings for the copy of such indictment."

MS. Rep.  
Gregg's  
case.

It was holden at a meeting of the judges on the twelfth day of *January* one thousand seven hundred and seven, to consider of some things relative to the intended trial of *Gregg*; that it is the safer way to deliver a copy of the caption, as well as of the body, of an indictment for high treason; and that the five days ought to be exclusive both of the day of delivery and the day of trial.

Salk. 153.  
634.

As the intention of this clause, in granting a copy of an indictment for high treason, is merely for the sake of enabling the person indicted to plead, it has been holden, that no person, after having pleaded to an indictment, is entitled to have a copy thereof.



No exception can be taken to the fulness of the copy of an indictment for high treason which has been delivered, after the indictment has been pleaded to.

4 Stat. Tr.  
646.  
Rookwood's  
case.

By 7 W. 3. c. 3. § 1. it is enacted, " That every person that shall be indicted, arraigned, or tried for high treason whereby any corruption of blood may be made, shall be admitted to make his full defence by counsel learned in the law; and in case any person so indicted shall desire counsel, the court before whom such person shall be tried, or some judge of that court, shall and is hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as the person shall desire, to whom such counsel shall have free access at all seasonable hours; any law or usage to the contrary notwithstanding."

By § 12. it is provided, " That neither this act, nor any thing therein contained, shall any ways extend to any impeachment or other proceeding in parliament, in any kind whatsoever."

But by 20 G. 2. c. 30. it is enacted, " That every person who shall be impeached by the Commons of Great Britain of any high treason, whereby any corruption of blood may be made, shall be received and admitted to make his full defence by counsel learned in the law, not exceeding two counsel, who shall be assigned for that purpose, on the application of the party impeached, at any time after the articles of impeachment shall be exhibited by the Commons."

By the 7 W. 3. c. 3. § 7. it is enacted, " That every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall have a copy of the panel of the jurors who are to try him duly returned by the sheriff, and delivered unto him two days at the least before he shall be tried."

But by § 13. it is provided, " That this act, or any thing therein contained, shall not extend to any proceedings upon an indictment for counterfeiting his majesty's coin, his great seal, or privy seal, his privy signet, or sign manual." [Vile Dougl. 590.]

By the 7 Ann. c. 21. § 11. it is enacted, " That from and after the decease of the person who pretended to be Prince of Wales during the life of the late King James, and since pretends to be King of Great Britain, and at the end of three years after the succession to the crown upon the demise of her majesty shall take effect, as the same is and stands limited, by an act made in the first year of the reign of their late Majesties King William and Queen Mary, intituled, *An act for declaring the rights and liberties of the subject, and settling the succession of the crown*, and by one other act, made in the twelfth year of the reign of his late Majesty King William the Third, intituled, *An act for the further limitation of the crown, and better securing the rights and liberties of the subject*, when any person is indicted for high treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be given at the same time that the copy of the indictment

" is

“ is delivered to the party indicted ; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial, and in the presence of two or more credible witnesses ; any law or statute to the contrary notwithstanding.”

By the 7 *Ann. c. 21. § 1.* and 3. it is enacted, “ That all high treasons hereafter committed within *Scotland* shall be heard and determined in *Scotland*, in such manner as is used in *England*.”

3 Inst. 14.  
Sty. 104.

If a person arraigned upon an indictment for high treason stood mute, his guilt was to be taken *pro confesso*; and the same judgment was always to be given, as if he had been convicted.

And since the 12 *G. 3. c. 20.* standing mute amounts in the case of petit treason to a confession of guilt.

By the 33 *H. 8. c. 23. § 3.* it is enacted, “ That peremptory challenges shall not from henceforth be admitted, or allowed, in any case of high treason.”

3 Inst. 27.

But it being by the 2 *Ph. & M. c. 10.* enacted, “ That all trials of treasons shall be according to the course of the common law, and not otherwise,” the right of challenging peremptorily in cases of high treason, which was incident to a trial at the common law, is thereby virtually restored.

### (Dd) Of the Evidence of Treason.

BY the 7 *W. 3. c. 3. § 7.* it is enacted, “ That every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall have the like process of the court where he shall be tried, to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to appear against him.”

It was not the usage heretofore, to examine the witnesses produced on the behalf of a person indicted of treason upon oath.

But by the 7 *W. 3. c. 3. § 1.* it is enacted, “ That every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall be admitted to make any proof that he can produce by lawful witness or witnesses, who shall then be upon oath, for his just defence ; any law, statute, or usage to the contrary notwithstanding.”

And by the 1 *Ann. § 2. c. 9. § 3.* it is enacted, “ That every person who shall be produced or appear as a witness on the behalf of the prisoner upon any trial for treason, before he be admitted to depose or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are by law obliged to do.”

By the 8 & 9 *W. 3. c. 25. § 5.* it is enacted, “ That if any puncheon, die, stamp, edger, cutting engine, press, flask, or other tool, instrument, or engine, used or designed for coining or counterfeiting gold or silver money, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody, or possession of any person what-

“ soever,

“foever, not then employed in the coining of money in some of his majesty’s mints, nor having the same by some lawful authority; that then it shall be lawful for any person discovering the same to seize, and he is hereby required to seize the same, and to carry it forthwith to some justice of the peace of the county, city, or place where the same shall be so seized, to be produced in evidence against any person, who shall be prosecuted for any offence by this act made high treason.”

It has been holden, that papers found in the custody of a person indicted for high treason may, although such papers are not in his own hand-writing, be read as evidence against him.

6 Stat. Tr.  
281. 321.  
322.  
Layser’s case.

And it seems to be settled, that papers may, in consideration of law, be in the custody of a person, although they are not actually found upon him.

Lord *Prefton*, together with *Afhton*, *Elliot*, and a servant of Lord *Prefton*’s, were found concealed under the quarter-hatches of a ship, in which they were going abroad. In the place wherein they were concealed, a packet was seen lying upon the ballast, with a piece of lead fastened to it; and two seals were found lying near the packet. Upon one of the seals was Lord *Prefton*’s coat of arms, the other was a seal belonging to the office of Secretary of State, which office had been enjoyed by Lord *Prefton* in the late reign. It appeared, likewise, that the packet was taken up by *Afhton*, who was tried for the same high treason for which Lord *Prefton* was tried, and put into his bosom; from whence it was afterwards taken. It was holden, that this packet was so in the custody of Lord *Prefton*, that the papers therein contained might be read as evidence against him.

4 Stat. Tr.  
431. 445.  
446. 450.  
Lord Prefton’s case.

In a very late case, divers papers were found in a bureau in the prisoner’s apartment. With these were found divers seals, with one of which every one of seven letters, proved to be in the prisoner’s hand-writing, appeared to have been sealed. It appeared also, that the prisoner had the general use of the bureau, which belonged to the person of whom he hired the apartment; but it likewise appeared, that this person had been sometimes seen to open it in the prisoner’s absence. It was holden, that these papers were so in the custody of the prisoner, that they might be read as evidence against him.

MS. Rep.  
Hensley’s  
case. Trial  
31 G. 2.  
[1 Burr.]

[A paper was found in the possession of a person engaged in the same conspiracy with the prisoner, containing intelligence previously proved to have been collected by the prisoner, which paper was in the hand-writing of the prisoner’s clerk. This was read in evidence against him. But a paper in the same hand-writing so found, not proved to be connected with the prisoner, was not admitted in evidence.]

Rex v.  
Stone,  
6 Term Rep.  
529.

By the 5 Ed. 6. c. 11. § 12. it is enacted, “That no person or persons shall be indicted, arraigned, condemned, convicted, or attainted for any treasons that now be or hereafter shall be perpetrated, committed, or done, unless the offender or offenders be thereof lawfully accused by two lawful accusers; which accusers, at the time of the arraignment of the party, if they be then living, shall be brought in person before the party

“ so accused, and avow and maintain that they have to say against  
 “ the said party, to prove him guilty of the treason contained in  
 “ the bill of indictment; unless the said party arraigned shall  
 “ willingly, without violence, confess the same.”

3 Inst. 26.  
 Fost. 235,  
 236, 237,  
 238, 239.

It seems to be the better opinion, that this statute is not repealed by the 1 & 2 Ph. & Mar. c. 10. by which it is enacted,  
 “ That all trials of treasons shall be according to the course of  
 “ the common law:” by which one witness was sufficient in any case.

But, however that may be, it is, by the 7 W. 3. c. 3. § 2. enacted,  
 “ That no person shall be tried or attainted of high treason,  
 “ whereby any corruption of blood may be made, but by  
 “ and upon the oaths and testimony of two lawful witnesses,  
 “ either both of them to the same overt act, or one of them to  
 “ one, and the other to another overt act of the same treason;  
 “ unless the party indicted and arraigned, or tried, shall willingly,  
 “ without violence, in open court confess the same, or  
 “ shall stand mute or refuse to plead, or in cases of high treason  
 “ shall peremptorily challenge above the number of thirty-five of  
 “ the jury; any law, statute, or usage to the contrary notwithstanding.”

5 Stat. Tr.  
 38.  
 Vaughan's  
 case.  
 Raym. 207.

In an indictment for compassing or imagining the king's death, the being armed with a dagger for the purpose of killing the king was laid as one overt act, and the being armed with a pistol for the same purpose as another overt act. It was holden, that proving one of the overt acts by one witness, and the other by a different witness, was proof by two witnesses within the meaning of the 7 W. 3. c. 3.

MS. Rep.  
 Gregg's  
 case.

At a meeting of the judges, on the twelfth day of January one thousand seven hundred and seven, to consider of some matters relative to the intended trial of *Gregg* for high treason, *Holt*, Chief Justice, *Powel*, Justice, *Peavis*, Justice, *Smith*, Justice, *Dormer*, Justice, and *Bury*, Justice, were of opinion, that the prisoner's confession, although not made in court, if proved by two witnesses to have been voluntarily made, notwithstanding what is contained in the 7 W. 3. c. 3. § 2. was sufficient evidence to convict upon: but *Trevor*, Chief Justice, was of a contrary opinion; and *Tracy*, Justice, doubted.

Fost. 241,

But, at a conference of the judges, in the year one thousand seven hundred and sixteen, it was agreed, that only a confession upon an arraignment is within the meaning of the 5 & 6 Ed. 6. c. 11. and that this is so, because it amounts to a conviction.

Fost. 241,  
 242.

And it seems to be the better opinion, that if the confession of the prisoner be not made in open court, it ought only to be admitted in corroboration of other evidence, and that two witnesses besides confession are necessary to a conviction.

By the 7 W. 3. c. 3. § 4. it is enacted “ That if two or  
 “ more distinct treasons of divers heads or kinds shall be alleged  
 “ in one bill of indictment, one witness produced to prove one of  
 “ the said treasons, and another produced to prove another of the  
 “ said treasons, shall not be deemed or taken to be two witnesses  
 “ within the meaning of this act.”

As it is only made necessary by the 7 *W. 3. c. 3.* to prove one overt act of high treason, by which corruption of blood may be made, by two witnesses, or two overt acts of the same treason by two witnesses, every other fact collateral to an overt act of high treason may be proved by one witness.

5 Stat. Tr.  
38.  
Vaughan's  
case.

It has been holden, that if it be necessary to prove a person indicted for high treason to be one of the king's subjects, it is sufficient to prove this by one witness.

*Ibid.*

It seems to be the better opinion, that two witnesses are necessary to convict a person indicted for petit treason, for that the 5 & 6 *Ed. 6. c. 11.* is not, as to this, repealed by the 1 & 2 *Ph. & M. c. 10.*

Fost. 233.  
239. 337.

By the 7 *W. 3. c. 3. § 8.* it is enacted, "That no evidence shall be admitted or given of any overt act of high treason, which is not expressly laid in the indictment, against any person whatsoever."

But it is laid down, that where one overt act of treason, not laid in the indictment, conduces to the proof of another therein laid, evidence may be given of that overt act.

4 Stat. Tr.  
38.  
Vaughan's  
case.

If the overt act of treason laid in the indictment be a consultation to kill the king, any acting in pursuance of the consultation may be given in evidence; for this does not only prove a consent to the killing of the king, but it is moreover a proof of the overt act laid.

5 Stat. Tr.  
38.  
Vaughan  
case.  
Salk. 634.

[A letter sent by one of several conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy.]

Rex v.  
Stone,  
6 Term Rep.  
527.

## (Ee) Of the Judgment of Treason.

BY the 7 *W. 3. c. 3. § 9.* it is enacted, "That no mis-writing, mis-spelling, or false or improper Latin, shall, after conviction upon an indictment for high treason, be any cause to stay or arrest judgment thereupon."

But by the same section it is provided, "That any judgment given upon such indictment shall be liable to be reversed upon a writ of error, in the same manner as if this act had not been made."

If a man be convicted of high treason, that judgment which is called the solemn judgment is in some cases to be pronounced, in others that which is called the less solemn judgment.

But, if a woman be convicted of high treason, the judgment to be pronounced in all cases is, that she be carried to the prison from whence she came, and be drawn from there to the place of execution; and that she be there burnt (a).

[(a) *Vide*  
30 G. 3.  
c. 48. which  
directs that  
the judg-  
ment against

women on conviction of high treason shall no longer be, that they shall be burned, but only hanged; and that on conviction of petit treason, they shall receive the same sentence as persons convicted of wilful murder.]

The solemn judgment of high treason is always to be pronounced by the chief judge of the court.

Kel. 11.

Carth. 349.  
Walcot's  
case.

The form of the solemn judgment is different in different books. Nor is this to be wondered at: for it appeared, upon great search of records, in the case of *Walcot*, that before the time of *Henry the Seventh*, the form of this judgment was very uncertain; there being scarce two judgments to be found of which the form was the same.

Staundf.  
P. C. lib. 3.  
c. 19.  
3 Inst. 210.  
1 H.H.P.C.  
350.  
Carth. 315.  
Kilmar-  
nock's Tr.  
38.

The following seems, from divers books, to be the most approved form of the solemn judgment: that the person convicted be carried to the prison from whence he came, and be drawn from thence to the place of execution; that he be there hanged by the neck, and be cut down whilst he is alive; that his bowels be cut out of his body, and be burnt before his face; that his head be severed from his body, and his body be divided into four quarters; and that his head and quarters be disposed of as the king pleases.

1 H.H.P.C.  
351. 384.

The king may, by a warrant under the great seal, privy seal, privy signet, or sign manual, discharge or pardon such part of the punishment awarded by the solemn judgment as he pleases.

*Ibid.*

And it is usual, when a nobleman, or other great man, falls under this judgment, to pardon the whole of the punishment except the beheading.

Staundf.  
P. C. lib. 3.  
c. 19.

According to *Staundford's* account, part of the solemn judgment was heretofore, to be drawn *upon a hurdle*.

3 Inst. 210.  
Kilmar-  
nock's Tr. 38.

But no mention is made by *Coke*, Chief Justice, of drawing *upon a hurdle*; nor is this mentioned in a modern judgment.

1 H.H.P.C.  
382.

And drawing upon a hurdle does not seem ever to have been a necessary part of the solemn judgment; for *Shard*, Justice, once ordered a man, convicted of high treason, to be drawn, without being placed upon any thing, by horses to the place of execution: but this severity is not now used: the convicted person being always drawn upon a hurdle.

Staundf.  
P. C. lib. 3.  
c. 19.

Part of the judgment, according to the form in *Staundford*, was heretofore, that the privy members should be cut off.

3 Inst. 210.

But *Coke*, Chief Justice, does not mention cutting off the privy members as any part of this judgment; and it appears from some modern judgments, that it is not a necessary part thereof.

Ld. Raym.  
1, 2.  
Tucker's  
case.

A writ of error being brought to reverse an attainder of high treason, one error assigned was, that the words *secreta membra amputentur* were omitted in the judgment. *Samuel Eyre*, Justice, was of opinion, that the attainder ought not for this reason to be reversed; because the omission of these words is warranted by many precedents. *Giles Eyre*, Justice, seemed to think, that these words, as the practice at that time was to insert them, ought to have been inserted; but by reason of the multitude of precedents doubted. *Holt*, Chief Justice, gave no opinion as to this point. The attainder was reversed for another reason: and no notice is taken in the judgment of reversal, which was afterwards affirmed by the House of Lords, of the omission of these words.

Kilmar-  
nock's Tr.  
38.

It was no part of a judgment, pronounced, not many years ago, by Lord *Hardwicke*, High Steward, that the privy members should be cut off.

In divers old cases, and in some cases in the time of *Charles* the Second, the words *before his face*, or the words *whilst he is alive*, which are holden to be tantamount to the words *before his face*, are not inserted in the judgments after the words *and be burnt*. 12 Mod. 95, 96. Walcot's case. Carth. 349.

But the more general usage has been, to insert the words *before his face*, or the words *whilst he is alive*; and the attainder was, in *Walcot's* case, reversed by the court of the King's Bench, because both these sets of words were omitted; and the judgment of reversal was affirmed by the House of Lords. 12 Mod. 95, 96. Walcot's case.

The less solemn judgment of high treason is, that the person convicted be carried to the prison from whence he came; and be drawn from thence to the place of execution; and that he be there hanged by the neck, until he be dead. Staundf. P. C. lib. 3. c. 19. 3 Inst. 217. 1 H. H. P. C. 351.

It was in one case doubted, whether, when the less solemn judgment of high treason is to be pronounced by the court of King's Bench, it is to be pronounced by the Chief Justice, or as is done in felonies by the ancient justice. The judgment was in that case pronounced by the ancient justice; but to avoid all scruple, it was pronounced over again by the Chief Justice. 1 Ventr. 254. Bellew's case. Staundf. P. C. lib. 3. c. 19.

It is laid down in two books, that the solemn judgment ought to be pronounced in every case of high treason, except that of counterfeiting the king's money contrary to the 25 Ed. 3. *ft.* 5. c. 2. 3 Inst. 15. 3 Inst. 174.

The reason given for excepting the case of counterfeiting the king's money contrary to the 25 Ed. 3. *ft.* 5. c. 2. is that, as the judgment for this offence which was high treason at the common law, was only to be drawn and hanged, the same judgment, as that statute makes no alteration in the punishment, ought still to be pronounced: but that where an offence is made high treason by a statute subsequent to the 25 Ed. 3. *ft.* 5. c. 2. the judgment ought to be, as it is of all other high treasons at the common law, except that of counterfeiting the king's money, to be drawn, hanged, and quartered.

But it seems to be the better opinion, that, in some other cases of high treason, as well as that of counterfeiting the king's money contrary to the 25 Ed. 3. *ft.* 5. c. 2. the less solemn judgment ought to be pronounced.

It appears, from one case, that the less solemn judgment was some years after the 25 Ed. 3. *ft.* 5. c. 2. pronounced in the case of counterfeiting the great seal. 2 H. 4. 25. 1 H. H. P. C. 181.

*Coke*, Chief Justice, does indeed say, in speaking of this judgment, that it must be misreported. 3 Inst. 15.

But *Hale*, Chief Justice, is of opinion, that *Coke*, Chief Justice, was himself mistaken: for that the judgment, in the case of counterfeiting the great seal, may be either to be drawn and hanged; or to be drawn, hanged, and beheaded. 1 H. H. P. C. 352.

The opinion of *Hale*, Chief Justice, seems to be upon the whole right: but it seems a little strange to say, that either the solemn or the less solemn judgment may be pronounced in this case, which is a latitude unknown to the *English* law: and the rather, as he had but a few lines before said, upon the authority of both *Bracton* and *Fleta*, that, at the common law, the punishment of counterfeiting the great seal was to be drawn and hanged. 1 H. H. P. C. 351.

3 Inst. 17. If this were the punishment at the common law of that offence, the consequence must be, as is laid down by *Coke*, Chief Justice, in the case of counterfeiting the king's money, that, as the 25 Ed. 3. *ft.* 5. *c.* 2. has made no alteration in the mode of punishing this offence, the same punishment ought to be inflicted upon the person guilty thereof as was inflicted at the common law.

1 H.H.P.C. 352. *Hale*, Chief Justice, has, with great propriety, distinguished the cases upon statutes subsequent to the 25 Ed. 3. *ft.* 5. *c.* 2. by which divers offences, relative to the coin, have been made high treasons, from cases of offences made high treason, which were not so at the time of making that statute: his distinction is, that in the latter cases, as in offences against the protestant religion, the solemn judgment ought to be pronounced; but that, in offences relative to the coin, although some of these are made high treasons by statutes subsequent to the 25 Ed. 3. *ft.* 5. *c.* 2. the less solemn judgment ought, for the following reasons, to be pronounced.

*Ibid.* As these offences are in *cognita materia falsificationis monetae*, they are within the verge of the crime of falsifying money; and therefore ought to be punished in the same way as this crime is to be punished.

*Ibid.* It is unreasonable to think, that the legislature could intend to inflict a more severe punishment upon the counterfeiters of foreign coin, or upon the clippers of the king's money or foreign coin, than upon the counterfeiters of the king's money.

In support of this distinction divers cases are mentioned.

Dyer, 230. Wright's case, Trin. 6 Eliz. In one of these it is said to have been agreed by all the judges, that the less solemn judgment ought to be pronounced in a case of clipping the king's money: which offence was made high treason by the 5 Eliz. *c.* 11.

1 H.H.P.C. 353. In some subsequent cases of clipping the king's money, the solemn judgment was indeed pronounced: but it appears, upon looking into all the cases since *Wright's* case, that in much the greater part of them the less solemn judgment was pronounced.

2 Lev. 98. Ballow's case, Hil. 25 Car. 2. And in one of these it was resolved by all the judges, except *Vaughan*, Chief Justice, after a consultation had with the serjeants at *Serjeant's-Inn*, that the less solemn judgment ought to be pronounced in the case of clipping the king's money.

1 H.H.P.C. 252. 2 Roll. Rep. 50. It is admitted by *Hale*, Chief Justice, that in one case, which was *Mich.* 16 *Ja.* 1. the solemn judgment was pronounced upon a man convicted of counterfeiting the privy signet, which offence was made high treason by the 1 Mar. *ft.* 2. *c.* 6.

But, as this case was determined before the law was settled in *Ballow's* case, as to the judgment of offences relative to the coin, which have been made high treasons by statutes subsequent to the 25 Ed. 3. *ft.* 5. *c.* 2. it may be fairly inferred, that, so far from being sufficient to overthrow the reasoning of *Hale*, Ch. J., and the cases mentioned by him, the case is not at this day law.

Judgment of high treason was in one case, upon a trial at bar, pronounced upon the day the prisoner was convicted.

6 Stat. Tr. 655. *Staley's* case. 4 Stat. Tr. 767. *Knightley's* case. But this judgment is, in a subsequent case, declared to be an unprecedented one; and it is, in the latter case, laid down by *Holt*,



*Holt*, Ch. J., that, if a prisoner have been convicted of high treason upon a trial at bar, the judgment ought not to be pronounced in less than four days after the conviction, provided there are so many remaining days in the term; because the prisoner ought to have so many remaining days to move in arrest of judgment; and it is added, that, in case there are not four remaining days in the term, the judgment ought to be pronounced upon the last day of the term.

If a person have been attainted upon a judgment of outlawry on an indictment of high treason, no other judgment is to be pronounced: but a rule of court is to be made for his execution; that judgment, which is upon record, being a sufficient ground for the awarding of execution.

In every case wherein a person is convicted of petit treason, the less solemn judgment is to be pronounced.

3 Stat. Tr.  
855. 858.  
Holloway's  
case.

Staundf.  
P. C. lib. 3.  
c. 19. 3 Inst.

211. [St. 30 G. 3. c. 48. *supra* 549.]

[We cannot dismiss this subject without taking notice of an act which the legislature have lately found it necessary to pass, in order to explain and enlarge some of the clauses of 25 E. 3. and to provide, with sufficient explicitness, against the treasonable attempts of the present times. It is enacted by 36 G. 3. c. 7. "That if any person, during the life of his present majesty, and until the end of the next session of parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the king, his heirs and successors; or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm or of any other of his dominions; or to levy war against his majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or to intimidate, or overawe, both houses, or either house of parliament; or to move or stir any foreigner with force to invade this realm or any other of his majesty's dominions; and such compassings, imaginations, &c. shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed:" the offender shall be deemed a traitor, and punished accordingly. The benefits of the acts of 7 H. 3. c. 3. and 7 Ann. c. 11. are reserved to the offender.]

## Trespass.

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**T**HE word trespass is derived from the *French* word *trespasser*, which signifies to go beyond what is right. It follows, that every injurious act is in the large sense of the word a trespass. But, as divers injurious acts are called felonies, and are distinguished by particular names, as treason, murder, &c. the word trespass does not, in the legal sense thereof, extend to any such injurious acts.

Some trespasses are not accompanied with force. A trespass of this kind is called a trespass upon the case: and the method of proceeding against the wrong-doer is by an action of trespass upon the case. This action has been already treated of, under the title *Action upon the Case*.

Other trespasses are accompanied with force, either actual or implied.

If a trespass accompanied with actual force have been injurious to the publick, the proper method of proceeding against the wrong-doer is by indictment or information. If a trespass accompanied with actual force have only been injurious to one or a few persons, the wrong-doer may in some cases be proceeded against by indictment or information, and in all by indictment; for, although the injury was done only to one or a few persons, yet, as every trespass accompanied with actual force amounts to a breach of the peace, it is an offence against the publick.

The method of proceeding by indictment or information, against persons guilty of such trespasses as are offences against the publick, has been shewn under the titles *Indictment* and *Information*.

Besides being liable to an indictment or information, the person guilty of a trespass accompanied with actual force, which has been injurious to one or a few persons, is liable to an action of trespass.

If a trespass, not accompanied with actual force, have only been injurious to one or a few persons, the only method of proceeding against the wrong-doer, this not being a publick offence, is by an action of trespass.

The writ by which an action of trespass is commenced, is sometimes returnable, at other times it is not. It is in the election of the party injured by a trespass, to sue out a writ of trespass that is returnable, or one that is not. The latter writ is called a *vicon-tiel* writ; because the matter therein complained of is to be determined before the sheriff to whom the writ is directed.

As the *vicon-tiel* writ of trespass is at this day very seldom sued out, it is by no means necessary to go into the consideration of the action thereupon founded.

The

The design at present is, to treat of that action, which is founded upon the returnable writ of trespass.

As the writ of trespass which is returnable always contains the words *vi et armis*, the action founded thereupon is, to speak with propriety, *an action of trespass vi et armis*. But, as such action is almost as frequently called *an action of trespass*, as *an action of trespass vi et armis*, and as it is by the former name sufficiently distinguishable from *an action of trespass upon the case*, it is by no means necessary to add, in treating thereof, the words *vi et armis*.

Divers things relative to an action of trespass, as tender and bringing money into court, damages, and costs, have been treated of under the titles *Tender and bringing Money into Court, Damages, and Costs*.

The remaining matter, which appertains to this Title, shall be arranged in the following order :

(A) In what Cases an Action of Trespass in the general lies.

(B) In what Cases an Action of Trespass lies for an Act which, although it was in the first Instance lawful, becomes afterwards a Trespass *ab Initio*.

(C) By whom an Action of Trespass may be brought,

1. Where the Injury was done to a Person.
2. Where the Injury was done to Personal Property.
3. Where the Injury was done to Real Property.

(D) For what Injuries to the Person an Action of Trespass lies.

1. For a Battery.
2. For an accidental Stroke.
3. For a false Imprisonment.

(E) For what Injuries to Personal Property an Action of Trespass lies.

1. To live Property.
2. To dead Property.

(F) For what Injuries to Real Property an Action of Trespass lies.

1. To Land.
2. To a Building.

(G) Against

(G) Against whom an Action of Trespass may be brought.

1. In the General.
2. For an Injury to Real Property.

(H) In what Court an Action of Trespass may be brought.

(I) Of the Pleadings in an Action of Trespass.

1. Of the Writ.
2. Of the Declaration.
  1. *In the General.*
  2. *Of declaring with a Continuando.*
3. Of the Plea.
  1. *Of pleading in Abatement.*
  2. *Of pleading in Chief.*
    1. *The General Issue.*
    2. *A Special Plea.*
    3. *Both the General Issue and a Special Plea.*
    4. *Of giving Colour.*
4. Of the Replication.
  1. *In the General.*
  2. *Of making a new Assignment.*

(K) Of the Evidence in an Action of Trespass.

(A) In what Cases an Action of Trespass in the general lies.

Str. 635.  
Reynolds v.  
Clarke.  
Ld. Raym.  
1402. S. C.  
[(a) The  
lawfulness  
or unlawfulness  
of the  
original act,  
is not the

WHETHER an injury has been received from an act which was in the first instance unlawful, an action of trespass lies, although the act were not accompanied with actual force, there being in every such case an implied force. But, where the injury which has been received was the consequence of an act which was in the first instance lawful, an action of trespass does not in the general lie, the proper remedy being an action upon the case (a).

criterion between an action of *trespass* and an action *on the case*, nor is it to be found in Lord Raymond's report of the above case; it is argumentatively denied by Fortescue, J. in the instances put by him in Strange's report, and expressly controverted by Blackstone, J. in *Scott v. Shepherd*, 2 Bl. Rep. 894. 3 Will. 499. and by De Grey, C. J. S. C. 2 Bl. Rep. 899. 3 Will. 411. in which last case several instances are put, where *trespass* will lie for the consequences of an act *lawful* in its commencement, and *case* for those where the original act was unlawful. The true and solid distinction is between *direct and immediate injuries* on the one hand, and *mediate or consequential* on the other: and trespass never lay for the latter. *Shapcott v. Mugford*, 1 Ld. Raym. 187. *Howard v. Bankes*, 2 Burr. 1114. *Hawker v. Birbeck*, 3 Burr.

3 Burr. 1556. Gates v. Bayley, 2 Will. 313. Scott v. Shepherd, *ubi supra*. Morgan v. Hughes, 2 Term Rep. 225. Day v. Edwards, 5 Term Rep. 648. Savignac v. Roome, 6 Term Rep. 125. But, when we say that trespass never lay for *consequential injuries*, we thereby mean such acts as consequentially only become injurious; not that consequential damages can only be redressed in an action on the case. For where the act done is a direct invasion of the plaintiff's property in possession, consequential or remote, as well as immediate, damage may well be set forth in the declaration in trespass *vi et armis*: as, that the defendant entered into the plaintiff's grounds and destroyed his fences, *by means whereof the cattle of divers strangers escaped thither and consumed the grass*. 3 Wils. 253.]

If one man fix a spout for the carrying of water from his house, and the water thereby carried fall and do damage upon the ground of another, the latter cannot maintain an action of trespass; for, as the fixing of the spout was lawful, the injury is consequential. Str. 635. Reynolds v. Clarke. Ld. Raym. 1402. S. C.

If J. S. dig a trench in his own land, or in the land of a stranger, by which the water is diverted from the river of J. N., J. N. cannot maintain an action of trespass, inasmuch as he had no right to complain of the act done by J. S. until the consequence thereof was injurious to him. Ld. Raym. 1402. Liveridge v. Hodges.

If an injury be the consequence of non-feasance, an action of trespass does not lie; for, there cannot have been any force, either actual or implied, where no act has been done.

If the person entitled to tithe do not, after having received notice that the tithe is set out, fetch it away in a reasonable time, he is liable to an action upon the case, for the injury sustained by the lying thereof too long upon the land: but an action of trespass does not lie; because the injury arises from non-feasance. Ld. Raym. 188. Shapcott v. Mugford.

If J. S. who ought to repair the bank of a river, neglect to do it, and for want of its being done the ground of J. N. be overflowed; J. N. may recover a satisfaction for the injury in an action upon the case: but he cannot maintain an action of trespass, because the injury arises from non-feasance. Bro. Aet. sur le Case, pl. 36. Fitz. N. B. 93.

It is said in one case, that if A. break the hedge of B. to the value of four-pence, and beasts of common of J. S. enter through the breach into the close of B. and do damage, B. shall recover damages for the whole injury in an action of trespass, against A. But it is laid down in another case, that if an injury, for which the proper remedy is an action upon the case, be contained in the declaration in an action of trespass, judgment ought, in case there is a general verdict for the plaintiff, to be arrested (*a*); because the judgment against the defendant in an action of trespass is *quod capiat pro fine*, whereas the judgment against the defendant in an action upon the case is *quod fit in misericordia*. Bro. Trespass, pl. 179. Ld. Raym. 273. Courtney v. Collet. Carth. 437. S. C. [(*a*) So, *converso*, Savignac v. Roome, 6 Term Rep. 125.]

If, however, one injury, for which the proper remedy is an action upon the case, be, after alleging an injury proper for an action of trespass, contained in the declaration in an action of trespass under a *per quod*; judgment may be given, although there is a general verdict for the plaintiff; because that which comes under the *per quod* is not considered as an independent substantive injury, but as laid in aggravation of damages. Ld. Raym. 273. Courtney v. Collet. Str. 635.

[An action on the case was brought for damaging a colliery of the plaintiff, who obtained a verdict, and had an entire judgment on the three counts in the declaration. It was objected, that two of

Haward v. Banks, 2 Burr. 1114.

of

of the counts described a trespass *vi et armis*; for in them it was alleged, that the defendant caused great quantities of water to be conveyed through divers other collieries into that of the plaintiff; and that a count in trespass cannot be joined in the same declaration with a count in an action on the case. The court over-ruled the objection, saying, "that the plaintiff in his declaration described a fact, which might, at the trial, be proved to be either proper for an action of trespass, or on the case, according to the evidence: And it appears, that it was here proved at the trial to be the latter. If it had been proved to be trespass *vi et armis*, the plaintiff must in that event have been nonsuited. Before the trial it stood indifferent, whether it would come out to be the one or the other. However, in the nature of the thing, it must be a consequential damage; as the act complained of was done on the defendant's own soil."

1 Inst. 57.  
Bro. Act.  
sur le Cafe,  
pl. 99.  
Bro. Tresp.  
pl. 295.

It is laid down in one book, that if the bailee of cattle, which have been lent him to plough his land with, kill any of them, the owner of the cattle has an election to bring an action of trespass, or an action upon the case. But it is laid down in other books, that the bailee of cattle who has killed any of them, is not liable to an action of trespass, because he came lawfully to the possession of the cattle; the proper remedy being an action upon the case.

Hob. 180.  
Wheatley  
v. Stone.

It is in one book laid down, that the party injured by a rescue may have either an action of trespass, or an action upon the case.

Scott v.  
Shepherd,  
2 Bl. Rep.  
892.  
3 Wils. 499.

[A. threw a lighted squib into a market-house, where a large concourse of people were assembled: the squib fell upon the standing of B., who, to prevent injury to himself and his wares, threw it across the market-house, when it fell upon the standing of C. C. took it up, threw it among the crowd, when it burst, and put out the eye of D. The court of C. B., *Blackstone*, J. dissent., held, that trespass lay against A. at the suit of D., the new direction and the new force given it by B. and C. not being a new trespass, but merely a continuation of the original force impressed upon it by A.]

Sayer, 184.  
Moir v.  
Munday.  
[(a) Whe-  
ther the ac-  
tion for an

An action of trespass does not lie for making an excessive distress, in case there were a right to distrain, the remedy being an action upon the statute of *Marlbridge*. But, if there were no right to distrain, an action of trespass lies (a).

excessive distress shall be upon the statute, or an action of trespass, does not depend merely upon the right to distrain. If the things distrained are of a known, determinate value, so that the distress appears upon the face of the pleadings to be excessive, there, notwithstanding the distrainer had a clear right to distrain, trespass may be brought. If, on the other hand, they are of arbitrary and uncertain value, the action must be upon the statute. 1 Burr. 591.]

Gimbart v.  
Pelah,  
2 Str. 1272.

[If a man put cattle, which he has distrained *damage-feasant*, into a pound which happens to be in another county; this does not make him a trespasser, but only subjects him to the penalty in the statute of 1 & 2 P. & M. c. 12.

2 Bl. Rep.  
1193.

A trespass must be certain, and an injury to the party, or not so, at the time the act is done. Trespass therefore will not lie, except

except perhaps in certain cafes, for the arrest of privileged persons; because the allowing or difallowing of privilege is difcretionary in the court, and it would be to make the nature of the act depend upon their fubfequent judgment. So, the original taking of a fhip as prize is not a trespafs at common law; and therefore a fentence of the Admiralty, pronouncing a fhip not to be prize, cannot alter the nature of the original taking, fo as to entitle the captured to maintain trespafs in the common law courts.]

Doug. 594.

(B) In what Cafes an Action of Trespafs lies for an Act which, although it was in the firft Inftance lawful, becomes afterwards a Trespafs *ab Initio*.

IT has been fhewn under the laft head, that an injury, which has been received from an act which was in the firft inftance lawful (a), is not a trespafs. [(a) See *vide fupra*.]

But, in fome cafes, an act, which was in the firft inftance lawful, becomes afterwards a trespafs *ab initio*.

Wherever the perfon, who at firft acted with propriety under an authority or licence given by law, afterwards abufes the authority or licence, he becomes a trespafs *ab initio*.

If J. S., who has diftrained a beaft damage-feafant, afterwards kill or ufe the beaft, he becomes a trespafs *ab initio*. He had, by law, an authority to diftrain the beaft; but, as this extended only to the keeping of it as a pledge, in order to enforce the making of fatisfaction for the damage, the killing or ufing of the beaft was an abufe of the authority. 8 Rep. 146. The Six Carpenters' cafe. Bro. Tresp. pl. 29. pl. 273. 3 Wils. 20. [Dye v. Leatherdale, pl. 350.]

But every intermeddling with the thing diftrained does not amount to fuch an abufe of the authority to diftrain, as to make the diftrainer a trespafs *ab initio*.

If a man, who has diftrained armour, fcour it, in order to preferve it from ruft, he does not become a trespafs *ab initio*; for this, far from being injurious, is beneficial to the owner.

Cro. Eliz. 783. Duncomb v. Reeve.

But, if a man, after having diftrained raw hides, tan them, he becomes, notwithstanding they would otherwife have rotted, a trespafs *ab initio*; because this, however it may at firft fight feem to be a benefit, is an injury to the owner; for he can never be fure of having his own hides again, the nature of them being fo changed by the tanning that they cannot be known.

Ibid.

A conftable, who had the warrant of a juftice of the peace to fearch the houfe of J. S. for ftolen goods, pulled down the clothes of a bed in which there was a woman, and attempted to fearch under her fhift. It was holden, that by this indecent abufe of his authority, he became a trespafs *ab initio*.

Clayt. 44. Ward's cafe.

The law gives every man a licence of going into an inn at feafonable times: yet, if a man, who goes lawfully into an inn, be afterwards guilty of an injurious act therein, he becomes a trespafs *ab initio*; because this is an abufe of the licence.

8 Rep. 146. The Six Carpenters' cafe. Bro. Tresp. pl. 359.

By the 11 Geo. 2. c. 19. § 19. it is enacted, "That where  
 " any distress shall be made for any rent justly due, and any un-  
 " lawful act shall be afterwards done by the party distraining, or  
 " by his agent, the distress shall not be therefore deemed un-  
 " lawful, nor the party making it a trespasser *ab initio*."

By the 17 Geo. 2. c. 38. § 8. it is enacted, "That where any  
 " distress shall be made by an overseer, by virtue of a warrant of  
 " distress, for any money justly due for the relief of the poor,  
 " the party distraining shall not be deemed a trespasser *ab initio*  
 " on the account of any irregularity done by such party."

It is in the general true, that a man, who has been only guilty  
 of a negative abuse of an authority or licence given by law, does  
 not thereby become a trespasser *ab initio*; because he has only been  
 guilty of a non-feasance.

3 Rep. 146.  
 The Six  
 Carpenters'  
 case.  
 Ld. Raym.  
 188.

If J. S., who has distrained a beast damage-feasant, refuse to  
 deliver it upon a tender of amends before the impounding there-  
 of, this is a negative abuse of the authority given by law to dis-  
 train; and the owner of the beast may recover damages for the  
 detention: but, as the injury arises from a non-feasance, J. S.  
 does not become a trespasser *ab initio*.

3 Rep. 146.  
 The Six  
 Carpenters'  
 case.

If a man, who went lawfully into an inn, refuse to pay for the  
 liquor he has called for, this is a negative abuse of a licence given  
 by law to go into an inn; but the man does not become a trespasser  
*ab initio*.

But in some cases a man, who has been only guilty of a ne-  
 gative abuse of an authority or licence given by law, does become  
 a trespasser *ab initio*.

Bro. Faux  
 Impr. pl. 5.  
 pl. 7. pl. 12.  
 pl. 23.  
 1 Jon. 378.  
 Salk. 409.  
 Ld. Raym. 632.

If a sheriff have not returned a writ which ought to have been  
 returned, he becomes, although this be only a non-feasance, a  
 trespasser *ab initio*, as to every thing which has been done under  
 the writ.

Bro. Faux  
 Impr. pl. 5.  
 pl. 22.  
 1 Jon. 378.  
 Cro. Car.  
 446.

If a bailiff have, by virtue of a warrant from a sheriff, exe-  
 cuted a writ which ought to have been returned, he does not, al-  
 though the writ has not been returned, become a trespasser *ab*  
*initio*: for it would be unreasonable to punish the bailiff for the  
 default of returning the writ; which could only be returned by  
 the sheriff.

2 Roll. Abr.  
 563. pl. 18.  
 Ld. Raym.  
 632.

But, if the bailiff of an inferior court have not returned a writ  
 which ought to have been returned, he becomes a trespasser  
*ab initio*, as to every thing which has been done under it: because  
 he is the principal officer, and not, as in the case of a bailiff act-  
 ing under a warrant from a sheriff, a subordinate one; and, con-  
 sequently, it was his duty to return the writ.

Reed v.  
 Harrison,  
 2 Bl. Rep.  
 1218.

[If goods are attached under process of an inferior court, the  
 officer cannot legally continue in possession of the defendant's  
 house, or keep the goods therein for a long or unreasonable time;  
 but must remove them to a place of safe custody; else he is a  
 trespasser *ab initio*.]



The person who is guilty of an abuse of an authority in fact, does not thereby become a trespasser *ab initio*.

If the bailee of a beast, which was delivered to him to be kept, kill or use it, he is liable to make satisfaction for the abuse of the authority given by the owner of the beast; but he does not thereby become a trespasser *ab initio*.

Bro. Tresp.  
pl. 295.  
pl. 327.  
Bro. Act. sur  
le Case, pl. 99.

If a beast, which has been distrained for a rent-charge, be killed or used by the distrainer, he does not become a trespasser *ab initio*; because the distress must, in this case, be made under an authority in fact; for an authority to distrain is not incidental to a rent-charge, as it is to a rent-service, but must always have been given by the grantor thereof.

1 Inst. 142,  
143.  
Perk. l. 691.

The reason of the difference between the case of an abuse of an authority in fact, and that of an abuse of an authority given by law, is, in one book, said to be, that the abuse in the latter case is deemed a trespass *ab initio*; because the law intends, from the subsequent tortious act, that there was, from the beginning, a design to be guilty of an abuse of the authority. But this reason, which applies equally to both cases, is by no means conclusive: for it may be as well intended, in the case of an authority in fact, from the subsequent tortious act, that there was, from the beginning, a design of being guilty of an abuse thereof. Perhaps the difference between the two cases may be better accounted for in the following manner: in the one, where the law has given an authority, it seems reasonable, that the law should, in order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make every thing done void; and leave the abuser in the same situation as if he had done every thing without any authority. And this agrees with the maxim, *actus legis nemini facit injuriam*. In the other case, where a man, who was under no necessity of giving an authority to any person, has thought proper to give an authority to a certain person, and this person is guilty of an abuse of the authority, there is no reason that the law should interpose, so as to make every thing done under it void; because it was his own folly, to trust a person with an authority who has shewn himself not fit to be trusted therewith. The interposition of the law in such case would, moreover, be contrary to the maxim, *vigilantibus non dormientibus servit lex*.

8 Rep. 146;  
The Six  
Carpenters'  
case.

### (C) By whom an Action of Trespafs may be brought.

#### 1. Where the Injury was done to a Person.

ONLY the person to whom the injury was done can maintain an action of trespafs for a personal injury.

If a son or daughter have been falsely imprisoned, neither the father nor the mother can maintain an action of trespafs.

Cro. Eliz.  
770.  
Barham v.  
Dennis.

**Sid. 225.** If a daughter have been debauched, her father may maintain an action of trespass (a): but he can only recover damages for the loss of the daughter's service; no damages being recoverable by him for the personal injury done to the daughter.

**Sippora v. Bassett.**  
**Clayt. 133.** [(a) In **Ben-nett v. Alcott**, 2 Term Rep. 166. it is said, that an action merely for debauching a man's daughter, by which he loses her service, is an action on the case; but that, according to Lord C. J. Holt's opinion where the offence is accompanied with an illegal entry of the father's house, he has his election to bring either trespass or case. However, in **Ld. Raymond 1032.** (the authority referred to,) the distinctions taken seem to be, not between trespass and case, but different forms of trespass and assault. In **Tullidge v. Wade**, 3 Will. 18, 19. the action was trespass, and no entry of the house. 3 Wooddesl. 245. note.]

**3 Rep. 38.** An ancestor, before tenure by knight-service was taken away, could have maintained an action of trespass for the taking away of his heir: but he could only have recovered damages for the loss of the marriage of the heir; no damages being recoverable by him for the personal injury done to the heir.

**Ratcliff's case.**  
**2 Wms. 116. 128.**  
**Cro. Eliz. 770.**  
**Bro. Tresp. pl. 131.** If a servant have been beaten, no one except himself can maintain an action of trespass for the injury done to his person. And although a master may, where his servant, lawfully retained, has been beaten, maintain this action, he cannot recover any damages for the personal injury done to the servant; for his recovery can only be for the consequential damages he has sustained, by the servant's having been rendered, by the beating, incapable, or less capable, to perform his service.

**Hart v. Aldridge.** [Trespass lies at the suit of a master for enticing away a servant from his actual service.]  
**Cowp. 54.**

**Salk. 119.** If a wife have been falsely imprisoned, her husband may, in an action of trespass, obtain satisfaction for the damages he has sustained, by having been deprived of the company and comfort of his wife, and by the business of his house having been neglected during her absence: but he cannot recover any damages for the personal injury done to the wife. It is indeed true, the husband must always join with a married woman in an action of trespass for a personal injury done to herself: but, as this is owing to the incapacity of a married woman to sue alone, unless she be entitled by special custom so to do, or unless her husband become incapable of suing, it is by no means to be considered as an exception to the general rule, that only the person to whom the injury was done, can maintain an action of trespass for the personal injury.

**7 Mod. 81.** [A husband may maintain trespass for an adulterous intercourse with his wife, force and violence being supposed in law to accompany this atrocious injury.]  
**2 Salk. 552.**

## 2. Where the Injury was done to Personal Property.

**Bro. Tresp. pl. 303.** The person, in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring of the chattel by a stranger, although he have never had a possession thereof in fact: for a general property always draws to it a possession in law; which is, in the case of a personal chattel, by reason

reason of the transitoriness of its nature, sufficient to found this action upon.

[To entitle a man to bring trespass, he must, *at the time* when the act was done which constitutes the trespass, either have the *actual possession* in him of the thing, which is the object of the trespass, or he must have a *constructive possession*, in respect of the right being vested in him. Therefore the lord may, before seizure, maintain trespass for an estray or wreck, taken by a stranger. For the *right* is in the lord, and a *constructive possession* in respect of the thing being within the manor of which he is lord. So, the executor has the *right* immediately on the death of the testator, and the right draws after it a *constructive possession*. The probate is a mere ceremony; for, when passed, the executor does not derive his right under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, &c. before probate. But there seems to be no instance where a man, who has a new right given to him, which, from reasons of policy, is so far made to relate back as to avoid all mesne incumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him. Hence trespass will not lie by the assignees of a bankrupt against a sheriff for taking the goods of the bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sold them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignee not to sell them.]

1 Term Rep.  
480. Per  
Ashurst, J.

Smith v.  
Milles, *ubi*  
*supra*.

If the owner of goods, which are at *York*, give them to *J. S.*, who at the time of the gift is in *London*, and before *J. S.* have obtained the actual possession of the goods a stranger take them, *J. S.* may maintain an action of trespass against the stranger; for by the gift he acquired a general property in the goods.

Bro. Tresp.  
pl. 303.  
Latch, 214.

But, if the bailee of goods have given them to *J. S.* and a stranger take them before they are delivered to *J. S.*, this action cannot be maintained by *J. S.*, because by this gift, it being the gift of a person who had only a special property in the goods, *J. S.* did not, as they were not delivered to him, acquire any property in them.

Bro. Tresp.  
pl. 216.

If the goods of a testator, who has appointed an executor, are taken by a stranger before the testator's will is proved, and afterwards the executor proves the will, he may maintain an action of trespass for the taking of them: for, although an executor has not any property in the goods of his testator until he has proved his will, yet, when this is done, he acquires a general property therein from the time of the death of his testator.

2 Bullst. 268.  
Fisher v.  
Young.

If a testator have bequeathed certain specifick goods to *J. S.* the legatee may bring an action of trespass for an injury done to the goods by a stranger, although the injury was done before they were delivered to him by the executor: because the legatee did, immediately upon the testator's death, acquire a general property in the goods.

Bro. Tresp.  
pl. 25.

Bro. Tresp.  
pl. 25.

But, if a testator have bequeathed a third part of his goods to J. S., and some of the testator's goods, before the third part thereof was delivered to J. S. by his executor, be taken by a stranger, the legatee cannot maintain this action; because he does not, in this case, acquire a property in any of the testator's goods, until they are delivered to him by the executor.

Fitz. N. B.  
91.

If wrecked goods are thrown on shore, and before a seizure thereof is made, a stranger take them away, the person in whom the right of wreck is, may maintain an action of trespass inasmuch as a general property in the goods was, immediately upon their being thrown on shore, vested in him.

Blakey v.  
Dinsdale,  
Cowp. 661.

[Where the vendor sold goods by sample to be delivered to the vendee within a month, and took earnest, and within that time sent the goods by his servant to the vendee's house, where, part being unloaded, the rest were distrained for toll, the delivery was complete, so as to entitle the vendee to bring trespass for the seizure. For here was an actual, not a constructive, possession; though, had part not been lodged in the vendee's house, yet the delivery was complete as to all honest purposes, in respect of third persons, the moment the vendor had delivered the goods to his servant to carry them to the vendee.]

2 Roll Abr.  
569. P. pl. 5.  
Sid. 438.

Every person, in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although the trespass was committed, whilst the chattel was in the possession of another, who had a special property therein.

2 Roll. Abr.  
569. P. pl. 5.

If the goods of J. S., which were bailed to J. N., are taken from or injured in the hands of J. N. by a stranger, J. S., in whom the general property still remains, may maintain an action of trespass.

Bro. Tresp.  
pl. 216.  
pl. 295.

But, if the bailee of goods have delivered them to a stranger, the bailor cannot maintain this action; because the general property in the goods is changed by the delivery of a person who had a special property therein.

Fitz. N. B.  
89. 92.

1 Inst. 89.  
Bro. Tresp.  
pl. 83.

4 Rep. 84.  
13 Rep. 69.

Every person, who is answerable to another for a personal chattel in his possession, has such a special property in the chattel as enables him to maintain an action of trespass for the taking or injuring thereof by a stranger.

2 Roll. Abr. 569. pl. 5. pl. 7. Sid. 438. 2 Saund. 47.

4 Rep. 84.  
Southcote's  
case.

This distinction was formerly taken; namely, that if goods, which have been delivered generally to a man to be kept, are taken from him by a stranger, the bailee may maintain an action of trespass, because he is answerable for the goods to the owner: but that if goods, which have been delivered to a man to be kept as he keeps his own, are taken by a stranger, the bailee cannot maintain this action; because he is not answerable for the goods to the owner. But in a modern case, in which *Southcote's case* and all the old cases were considered, this distinction is exploded. It is in this case laid down, that the bailee of goods, which have been

Ld. Raym.  
913, 914.  
915. Coggs  
v. Barnard.

delivered

delivered to be kept, is not, although the delivery were general, answerable to the owner for the goods, unless they are lost or injured by neglect or default of the bailee; for that it would be very unreasonable to make a man, who receives no benefit from keeping the goods of another, answerable for the taking or injuring thereof, unless he have been guilty of neglect or default. It seems to follow from this case, that the bailee of goods, when delivered generally to be kept, cannot maintain an action of trespafs for the taking or injuring of them by a stranger.

If *J. S.* have bailed a beast to *J. N.* for ploughing his land, and this beast be taken from *J. N.* by a stranger, *J. N.* may maintain this action; because, as the beast was delivered to *J. N.* for a purpose beneficial to himself, he is answerable for it to the owner.

If goods, which have been taken by a sheriff in execution, are taken from him by a stranger, he may maintain an action of trespafs; because he is answerable for the goods to the person at whose suit the execution was.

If goods of *J. S.* which have been delivered to *J. N.* to be carried for hire, are taken from *J. N.* by a stranger, *J. N.* may maintain an action of trespafs; because he is answerable for the goods to *J. S.*

The agistor of a beast may maintain an action of trespafs for the taking or injuring thereof by a stranger, whilst it is upon his land; because he is answerable for the beast to the owner.

Churchwardens may maintain an action of trespafs, for the taking of goods belonging to their church by a stranger during their churchwardenship; because they are answerable for the goods to their successors. And it is said, that churchwardens may maintain this action, for the taking of goods belonging to their church by a stranger during the churchwardenship of their predecessors. But it may be inferred from what is said in another book, that churchwardens cannot maintain this action, for the taking of goods belonging to their church by a stranger during the churchwardenship of their predecessors. And the latter seems to be the better opinion; for it is not reasonable that churchwardens should be answerable to their successors for goods belonging to their church, which were taken during the churchwardenship of their predecessors. It is moreover certain, that the churchwardens never had in this case an actual possession of the goods. It follows, that they never had a special property in the goods; for it is laid down in many cases, that no person can have a special property in a personal chattel, of which he never had the actual possession.

It is upon the whole clear, that both the person in whom the general property is, and the person in whom the special property is, may maintain an action of trespafs for the taking or injuring of a personal chattel by a stranger, whilst it was in the actual possession of the latter.

But, if either of these persons have recovered in such action, this shall oust the other of his right of action; otherwise the trespasser

Bro. Tresp.  
pl. 92.  
Ld. Raym.  
913. 915.

Sid. 438.  
Wilbraham  
v. Snow.  
1 Mod. 31.

Salk. 26.  
143.  
2 Rep. 84.  
1 Mod. 31.

Bro. Tresp.  
pl. 67.  
Moor, 543.

Fitz. N. B.  
92.  
1 Ventr. 89.  
1 Mod. 65.  
Fitz. N. B.  
89. 92.

Dyer, 48.

2 Roll. Abr.  
569. P. pl. 1

trespaffer would be liable to make a second fatisfaction for the fame injury.

Bro. Tresp.  
pl. 13.  
2 Roll. Abr.  
552. N. pl. 7.

Nor is this cafe like the cafe of the beating of a fervant, in which both the fervant and his mafter may maintain an action of trespafs; and the recovery of one fhall not oust the other of his right of action. For the two actions are in the latter cafe maintained upon quite different grounds; that of the fervant being to recover a fatisfaction for the perfonal injury; that of the mafter to recover a fatisfaction for the loss of service, which was the consequence of the perfonal injury.

### 3. Where the Injury was done to Real Property.

Bro. Tresp.  
pl. 38.  
pl. 305.  
pl. 346.  
3 Lev. 209.  
Litch, 263.  
2 Bulstr. 268.

Only the person, who has the poffeffion in fact of the real property to which an injury has been done, can maintain an action of trespafs *quare claufum fregit*; a general property not being in the cafe of real property, as it is in the cafe of perfonal, fufficient to found this action upon.

2 Leon. 147.  
Berry v.  
Goodman.  
Plowd. 546.  
4 Leon. 184.

And there must not only be a poffeffion in fact of the real property; but it must be a lawful one: for an intruder into land does not gain by the intrusion fuch a poffeffion, as will enable him to maintain an action of trespafs *quare claufum fregit*.

Bro. Sur.  
pl. 50.  
2 Roll. Abr.  
554.  
4 Leon. 184.

The person in whom the freehold of land is, cannot maintain an action of trespafs *quare claufum fregit* for an injury done to the land whilst it was in the poffeffion of another.

Plowd. 142.  
Browning  
v. Liffon.

An heir at law may make a lease of land descended upon him, before he has entered thereupon; but he cannot maintain an action of trespafs *quare claufum fregit*, before he has by entry acquired the poffeffion in fact.

2 Leon. 147.  
Berry v.  
Goodman.

If a fine *sur confuance de droit come ceo* be levied of land, the confusee thereby immediately obtains a poffeffion in law: but he cannot maintain an action of trespafs *quare claufum fregit*, before he has by entry acquired the poffeffion in fact.

Plowd. 528.  
Hare v.  
Bickley.

A parfon cannot maintain an action of trespafs *quare claufum fregit* for an injury done to his church, church-yard, or glebe, before he is inducted; it being the induction which gives him the poffeffion in fact of these things.

Bro. Tresp.  
pl. 365.

If a man, who once had the poffeffion in fact of a real estate, quit it or be deprived thereof, he cannot maintain an action of trespafs *quare claufum fregit* for an injury done thereto, which was done betwixt the time of his quitting or being deprived of the poffeffion, and his regaining the fame by re-entry.

2 Roll. Abr.  
553. S. pl. 4.  
Pl. 5.

The diffeifor of land cannot maintain an action of trespafs *quare claufum fregit* for an injury done thereto betwixt the time of the diffeifin and his re-entry; for he does not, until a re-entry be made, regain the poffeffion in fact of the land.

2 Roll. Abr.  
551. N. pl. 3.

It has been holden, that a leffor at will or for years of land, who has after the determination of the estate at will or for years re-entered, may maintain an action of trespafs *quare claufum fregit* for

for an injury done to the land during the continuance of the estate at will, or for years; because his reversion may have been thereby injured. But it seems to be the better opinion that he cannot: for in another book it is laid down, that only the lessee at will or for years of land can maintain this action for an injury done to the land during the continuance of the estate at will or for years; for that the remedy of the lessor, if the injury be of such a kind as to be prejudicial to the reversion, is by an action upon the case.

3 Lev. 209.  
Bideford  
v. Onflow.

If in a lease for years of land there be a reservation of the trees, the lessor may maintain an action of trespass *quare clausum fregit* for cutting down or injuring the trees during the continuance of the lease: for by the reservation of the trees the land on which they grow was reserved, and consequently the lessor has never been out of the possession in fact thereof.

Bro. Tresp.  
Pl. 55.

A lessee for years of land may maintain an action of trespass *quare clausum fregit* for an injury done to the land by any person during the continuance of his estate.

2 Roll. Abr.  
551. N. pl. 6.  
Sid. 347.

But a lessee at will of land can only maintain this action, where the injury to the land, done during the continuance of his estate, was done by a stranger. For if the injury were done by a person who entered under colour of title, this action does not lie.

2 Roll. Abr.  
551. N. pl. 3.  
pl. 4.  
Sid. 347.  
Geary v.  
Barecroft.

It is laid down in one book, that a tenant at sufferance of land has not such an interest as enables him to maintain an action of trespass *quare clausum fregit*. But it is in other books laid down, that a tenant at sufferance of land may maintain this action for an injury done by a stranger to the land.

Fitzh. Tresp.  
pl. 10.

If the person, who is entitled to the vesture or herbage of land, be disturbed in the enjoyment thereof, an action of trespass *quare clausum fregit* (a) lies.

2 Roll. Abr.  
551. N. pl. 7.  
13 Rep. 69.

552. N. pl. 8. Moor, 302. [(a) In a late case it was holden, that this action is maintainable by the person who is only in the enjoyment of the vesture of land, or other right, as that of digging and carrying away turf and peat, provided it be a separate and exclusive interest. Wilson v. Macreth, 3 Burr. 1824.]

1 Inst. 4.  
Bro. Tresp.  
pl. 273.  
2 Roll. Abr.

It has been holden, that the person, who is entitled to the grafs grown upon land after it has been mown, may maintain an action of trespass for spoiling the grafs; but that he cannot maintain an action of trespass *quare clausum fregit*.

3 Leon. 213.  
Hitchcock  
v. Hervey.

It is laid down, that no person can maintain an action of trespass *quare clausum fregit* for an injury done to the soil of a highway; for that, when land is dedicated to the service of the publick as a highway, it ceases to be private property. But it was in a modern case holden, that, although land be dedicated to the publick service as a highway, the property of the soil continues so in the dedicator, that he may maintain this action.

1 Bulstr.  
157.  
Durand v.  
Child.  
Str. 1004.  
L. de v.  
Shepherd,  
Hil. 8 G. 2.

A person cannot maintain an action of trespass *quare clausum fregit* for treading down the grafs growing upon land in which he has a right of common; for, although a commoner have a right to take such grafs by the mouth of his commonable cattle, he is not in the possession of the land.

Bro. Tresp.  
pl. 174.  
2 Roll. Abr.  
552. N. pl. 8.

Palm. 46.

Dawtrie

v. Dee.

[(a) The  
true reason  
is, that J. S.  
has not the

exclusive possession; the possession of the church being in the parson. 1 Term Rep. 420. But, the possession being in the parson, it seems to follow, that this is the proper kind of action, where the parson determines to sue one, who has preached in his church without his leave: for such intruder, Lord Holt says, is a trespasser. 12 Mod. 420. 453.]

It has been holden, that, although J. S. have a right to a seat in a church as belonging to an ancient messuage, he cannot maintain an action of trespass for being disturbed in the use thereof, or for an injury thereto done; for that the proper remedy is an action upon the case (a).

It is not necessary that the person, who brings an action of trespass *quare clausum fregit* for an injury to land, should be in the actual possession thereof at the time of bringing the action.

Bro. Tresp.

Pl. 12.

2 Roll. Abr.

569.

Plowd. 431.

If an injury were done to the land of J. S. while he was in the actual possession thereof, and J. S. afterwards quit the possession, an action of trespass *quare clausum fregit* may be brought by him.

Bro. Tresp.

Pl. 46.

2 Roll. Abr.

553. S. pl. 3.

The disseisee of land may maintain an action of trespass *quare clausum fregit* for an injury done to the land before he was disseised.

Bro. Tresp.

Pl. 421.

If the beast of A. be chased into land which is the property of A., but in the possession of B., A. may maintain an action of trespass for the injury done to his beast; but he cannot maintain an action of trespass *quare clausum fregit*.

Cro. Eliz.

143. Hare

v. Celey.

2 Roll. Abr.

568. N.

Pl. 2.

Although land in the possession of J. S. be sown by J. N., and it be moreover agreed by J. S. that J. N. shall have half the corn thereupon grown, J. N. cannot join with J. S. in an action of trespass *quare clausum fregit* for an injury done to the corn before it is severed; because he is not in the possession of the land.

## (D) For what Injuries to the Person an Action of Trespass lies.

### 1. For a Battery.

**A**N action of trespass lies for a battery.

But it is not necessary in this place to shew what constitutes a battery; because this has been already done under the title *Affault and Battery*.

### 2. For an accidental Stroke.

Bro. Tresp.

Pl. 213.

Pl. 310.

Hob. 134.

Latch, 13.

119.

If one man have received a corporal injury from the voluntary act of another, an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there were no design to injure.

Hob. 134.

Weaver v.

Ward.

If a soldier, for want of due caution, wound a man by the discharge of his gun in exercising, this does not amount to a battery;



tery; because there was no design to hurt: but an action of trespafs lies.

The defendant in uncocking his gun discharged the same, and wounded the plaintiff who was standing by and looking at him: it was holden that an action of trespafs lay.

Str. 596.  
Underwood  
v. Hewfon.

If a man ride an unruly horse, for the purpose of breaking it, in a place much frequented by the king's subjects, and the horse run away with the rider, and run over a man and hurt him, an action of trespafs lies.

1 Ventr.  
275.  
Anon.

But, if the corporal injury received is not to be imputed to the neglect of the party by whom it was done, or to the want of due caution, an action of trespafs does not lie, although it were the consequence of a voluntary act.

If, in the very instant a soldier discharges his gun in exercising, a person runs across, and is thereby wounded, an action of trespafs does not lie.

Hob. 134.  
Weaver v.  
Ward.

### 3. For a false Imprisonment.

An action of trespafs lies for every unlawful restraint of liberty.

If a person be unlawfully arrested in the street, this, although he be not carried into a house, is a false imprisonment.

Finch's  
Law, 202.

Every arrest of a man for a civil cause, which is not warranted by legal process, is an unlawful restraint of liberty.

2 Inst. 51,  
52.

It has been holden, that a custom to imprison a person without legal process is not good.

2 Jon. 147.  
Ekings v.  
Newman.

If a person be arrested under a process which was irregularly issued, this is a false imprisonment in the party at whose suit it was issued; for it was incumbent on him to take care that the process was regularly issued.

2 Jon. 214.  
1 Ventr.  
220.  
Str. 509.

But, if a person be arrested under a process which was erroneously issued, this is not a false imprisonment; because the irregular issuing of the process was owing to a mistake in an officer of the court, and not to the party at whose suit it was issued.

Str. 509.  
Philips v.  
Biron.

It seems to have been always holden, that it is not a false imprisonment in an officer to arrest a person under the process of superior courts, although the process were irregularly issued.

Bro. Faux  
Impr. pl. 31.  
1 Ventr. 220.  
Str. 509.

It is laid down by *Hale*, Ch. J. that an arrest of a person under the process of an inferior court, by an officer of the court, is a false imprisonment, in case the process were irregularly issued; it being incumbent upon the officer or minister of the court to take care that the process was regularly issued. But it is in divers books laid down, that the officer is not in this case liable to an action of trespafs; for that it would be hard to punish a person who has done nothing more than execute the process of a court, to which he owed obedience.

1 Ventr. 220.  
Read v.  
Willmot.

Cro. Ja. 3.  
2 Leon. 89.  
4 Leon. 78.  
2 Mod. 196.  
Str. 509.

If a known bailiff arrest a person under a warrant of the sheriff, he is not obliged to shew the warrant: for all persons are bound to

Bro. Faux  
Impr. pl. 23.  
9 Rep. 69.

to take notice that he is a bailiff; and it is at his peril to arrest a man without a lawful warrant.

Bro. Faux. But, if a special bailiff do not in such case shew his warrant, a fight thereof being demanded at the time of arresting, the arrest is a false imprisonment.

12 Mod. 387. If a known bailiff, who has two warrants against *J. S.*, one of which is legal, the other illegal, declare at the time of arresting *J. S.* that the arrest is by virtue of the illegal warrant, this is not a false imprisonment: for the lawfulness of the arrest does not depend upon what he declares, but upon the sufficiency of his authority to arrest *J. S.*

6 Mod. 211. It is in one case doubted, whether an arrest by the assistant of a bailiff, whose name is not in the warrant, even in the presence of the bailiff be not a false imprisonment.

1 Inst. 181. But, if a warrant be directed to two or more persons jointly and severally, an arrest by any one of these is not a false imprisonment.

Bro. Tresp. If a stranger assist a bailiff in confining a person, who has been arrested by the bailiff, this is not a false imprisonment.

Pl. 402.  
2 Roll. Abr.  
561. F. pl. 2. Cro. Car. 446.

2 Roll. Abr. If a stranger, after a man has been arrested, confine him at the request of the bailiff who arrested him, this is not a false imprisonment.

10 Rep. 76. It was formerly holden, that if a person be arrested under the process of an inferior court, for a cause of action which did not arise within the jurisdiction of the court, it is a false imprisonment in the officer who made the arrest, and in the party at whose suit it was made. A distinction was afterwards taken between the party, at whose suit the arrest was in such case made, and the officer who made it. It was holden to be a false imprisonment in the former; because it shall be intended, that he knew where the cause of action did arise; and it was a fault in him to sue in a court which had not jurisdiction in the matter. But it was holden not to be a false imprisonment in the officer, unless it appeared plainly that the cause of action did not arise within the jurisdiction of the court: for that, unless this did appear plainly, it was the duty of the officer to execute the process. This distinction seems to be at this day exploded; for it has been holden in another case, in which all the cases seem to have been well considered, that the party, at whose suit *J. S.* has been arrested under the process of an inferior court, is not liable to an action of trespass, although the cause of action did not arise within the jurisdiction of the court; for that *J. S.* can only take advantage thereof by pleading to the jurisdiction of the court.

compiler of this part of the work so confidently relies, seems scarcely reconcilable with later resolutions. It should appear to be now settled, that where an inferior court assumes a jurisdiction, an action of trespass lies against the officer who executes the process, because the whole proceeding is *coram non iudice*, and a mere nullity. *Perkin v. Proctor*, 2 Will. 382. and the cases there cited. *Hill v. Bateman*, 2 Str. 711. *Shergold v. Holloway*, *Id.* 1002.]

If a sheriff, to whom no writ was directed for the arresting of *A.*, make out a warrant to a bailiff to arrest *A.*, and *A.* be thereupon arrested, it is a false imprisonment in the sheriff, and in the bailiff; because there was no authority for the arrest.

1 Jon. 375.  
Girling's  
case.

But, if a writ were directed to a sheriff for the arresting of *A.*, and he make out a warrant to a bailiff, under which *A.* is arrested before the writ is delivered to the sheriff, this is no false imprisonment: for the writ is an authority for all that has been done, notwithstanding it was not delivered to the sheriff before the arrest.

3 Lev. 93.  
Osborne v.  
Brookhouse.  
2 Lev. 19.

Although, however, the arrest upon such warrant be good, the granting thereof by a sheriff, or his deputy, is unlawful: for, by the 6 Geo. 1. c. 21. § 53. it is enacted, "That if any high sheriff, under-sheriff, or his or their deputy, shall make or cause to be made or delivered out to any person whomsoever any warrant, before they or some one of them shall actually have in their custody the writ upon which such warrant ought to issue, that then the person or persons so offending, and every of them, shall forfeit ten pounds for every such offence."

If *A.* be arrested instead of *B.* whom the sheriff had a writ to arrest, this, although *B.* be very much like *A.* in the face, is a false imprisonment; for the sheriff is at his peril to take care, that he do not arrest any other person than him against whom the writ issued.

Bro. Office,  
pl. 8. 2 Roll.  
Abr. 552.  
O. pl. 5.  
1 Bulst. 149.

Nay, it has been holden, that if *A.* tell an officer, who has a warrant to arrest *B.*, that his name is *B.*, and thereupon the officer arrest *A.*, this is a false imprisonment; for that the officer is at his peril to take care, that he do not arrest any other person than him against whom the writ issued.

Moor, 457.  
Coote v.  
Lightworth.  
Hardr. 323.

It is by the 29 Car. 2. c. 7. § 6. enacted, "That the person serving or executing any writ, process, warrant, order, judgment, or decree, upon the Lord's day, except in cases of treason, felony, or breach of the peace, shall be as liable to the suit of the party grieved, and to answer damages for the doing thereof, as if he had done the same without any writ, process, warrant, order, judgment, or decree."

It is said, that the arresting of a clergyman under a civil process, either in going to church to perform divine service, or in returning from thence, on any day, is a false imprisonment.

Sheph. 1028.

If a person, against whom an escape warrant has issued, were arrested by the mob, and by them delivered to the sheriff, and the sheriff detain him, this is a false imprisonment; for, as he was not arrested by a proper officer, the arrest was illegal; and if so, the subsequent detention is illegal.

6 Mod. 154.  
Rich v.  
Doughty.

But, if a person, who was arrested by the bailiff of a liberty out of the liberty, were delivered by the bailiff into the custody of the gaoler of the liberty, it is not a false imprisonment in the gaoler to detain him, although an action of trespass would lie against the bailiff for the illegal arrest: for, inasmuch as the gaoler would have been liable to an action of escape, if he had refused to receive the arrested person, or if he had afterwards suffered him

Skin. 50.  
Elliot v.  
Befcy.  
2 Jon. 214.

to

to go at large, it would be very unreasonable that he should be liable to an action of trespass for detaining him.

**Cro. Car.** An unlawful detention of a person who has been arrested does, although the first arrest were lawful, amount to a new arrest, and consequently it is a false imprisonment.

379.  
Wythers v.  
Henley.

3 Bulstr. 97. If a plaintiff, by an order in writing, direct a sheriff to discharge a person, whom he has arrested under a *capias* or an *exigent* at the suit of the plaintiff, and the sheriff afterwards detain the person, this is a false imprisonment.

**Fitz. N. B.** If a sheriff detain a man, whom he has arrested under a *capias* or an *exigent*, after a writ of *superfedeas* has been delivered to him, this is a false imprisonment.

236. Cro.  
Ja. 379.  
1 Roll. Rep.  
141. 3 Bulstr. 97.

**Fitz. N. B.** But the detaining of a man, who has been arrested under a *capias ad satisfaciendum*, after a writ of *superfedeas* has been delivered to the sheriff, is not a false imprisonment; because a writ of *superfedeas* does not lie after a person is taken in execution.

237.  
1 Vent. 2.  
Jenk. 92.  
pl. 80. It is not a false imprisonment, either in a sheriff or gaoler, to detain a man who ought otherwise to be discharged, until he pay the fees due to the sheriff or gaoler.

2 Inst. 53. If the order of a court be to confine a person in a certain prison, the confining of him in any other prison is a false imprisonment.

Salk. 408. An officer, who has arrested a man under a *capias*, may confine him wherever he pleases; for the words of this writ are, *ita quod habeas corpus ejus coram, &c.*

Swinstead v.  
Lyddal.  
Skin. 664.

2 Inst. 51, 52. It is in the general true, that an arrest for a criminal cause, without an express warrant, is a false imprisonment.

Bro. Faux Impr. pl. 8. And wherever an express warrant is necessary to authorise an arrest for a criminal cause, an arrest without an express warrant can never be justified under one granted after the arrest.

2 Hawk.  
P. C. c. 13.  
§ 9.

But in some cases an arrest may be made for a criminal cause without an express warrant.

Bro. Faux Impr. pl. 1. If a felony have been committed, and *A.* have just cause to suspect it was committed by *B.*, *A.* may arrest *B.* without an express warrant.

1 Bulstr.  
150.

Bro. Faux Impr. pl. 8. But, if *A.* arrest *B.* without an express warrant, because *C.* has just cause to suspect that *B.* has committed a felony, *A.* is guilty of a false imprisonment (*a*); for the power of arresting without an express warrant is confined to the party suspecting.

1 Bulstr.  
151.  
2 Inst. 52.  
2 Hawk.  
P. C. c. 13. § 11. [Not if *A.* be a peace-officer; for a peace-officer may, upon a reasonable charge of felony, arrest a party without a warrant; nor will he be liable to an action, though it should afterwards appear that no felony has been committed. Samuel v. Payne, Doug. 350. But trespass is the proper form of action in such case against the party in consequence of whose suspicions the arrest was made. Stonehouse v. Elliott. 6 Term Rep. 315.]

A private perfon may without an exprefs warrant arrest perfons who are actually fighting; and keep them in cuftody until their paffion is over. 1 Inft. 52. Bro. Faux Impr. pl. 6. 1 Hawk. P. C. c. 63. § 11. 2 Hawk. P. C. c. 13. § 2.

And it is faid, that the arresting of a perfon, who is coming to the affiftance of one who is fighting, is not a falfe imprifonment. 1 Hawk. P. C. c. 63. § 11.

It is in the general true, that an arrest cannot be made, either by a peace-officer or a private perfon, on the account of an affray, after the affray is over, without an exprefs warrant. 2 Inft. 52. Bro. Faux Impr. pl. 6. 2 Hawk. P. C. c. 13.

But, if a man have received a dangerous wound in an affray, the party who gave the wound may be arrested after the affray is over, either by a peace-officer or a private perfon, without an exprefs warrant; and may be confined, until a judgment can be formed whether it be probable that the wound will prove mortal. 2 Inft. 52. Bro. Faux Impr. pl. 6. pl. 44. 1 Hawk. P. C. c. 63. § 12.

A private perfon may, without an exprefs warrant, arrest a perfon whom he fees upon the point of committing treason or felony, or of doing an act which may endanger the life of any perfon; and may confine him, until it may be reasonably fuppofed that he has laid afide the defign of committing the treason or felony, or doing the act. 2 H. H. P. C. 77.

A peace-officer may, without an exprefs warrant, arrest a perfon who has affaulted him. Bro. Faux Impr. pl. 41.

A private perfon may, without an exprefs warrant, confine a perfon difordered in his mind, who feems difpofed to do mischief to himfelf, or to any other perfon. Bro. Faux Impr. pl. 28. pl. 25.

It is laid down, that a private perfon may, without an exprefs warrant, arrest a night-walker; for that the doing of this is for the good of the publick. 2 Inft. 52. Bro. Tresp. pl. 416.

But it was holden in a modern cafe, that no perfon, not even a conftable, can arrest a night-walker, unlefs the night-walker have been guilty of fome diforderly act. Ld. Raym. 1301. Tooley's cafe.

A peace-officer may, without an exprefs warrant, arrest a perfon, againft whom a hue and cry has been levied. Bro. Faux Impr. pl. 6. pl. 16. 1 Roll. Abr. 559. D. pl. 1. pl. 2.

And it is laid down in fome books, without confining the power of arresting to a peace-officer, that the perfon, againft whom a hue and cry has been levied, may be arrested without an exprefs warrant. 2 Inft. 52. Bro. Tresp. pl. 213.

It is in the general true, that an exprefs warrant for the arresting of a perfon ought to be in writing.

But an arrest under a parol warrant of the court of King's Bench is not a falfe imprifonment. 2 Roll. Abr. 558. C. pl. 2.

It is laid down in one cafe, that the confining of a man for a fhort fpace of time, under the parol warrant of a juftice of the peace, for further examination is not a falfe imprifonment. Moor, 408. Broughton v. Mulhac.

But

*Cro. Eliz.* 829. *Savage v. Tatcham.* But it is in another case laid down, that a confinement for further examination, under parol warrant of a justice of the peace, ought not to exceed three days.

*Moor, 408.* It is lawful for a justice of the peace to authorise any person, by parol warrant, to arrest a person who has been guilty of a breach of the peace in his presence.  
*Broughton v. Multhoe.*  
*2 Hawk.*  
*P. C. c. 13. § 14.*

*Cro. Ja. 81.* A commitment under the warrant of a justice of the peace, which does not mention the crime for which the person is committed, is a false imprisonment.  
*Boucher's case.*

*Cro. Ja. 81.* But a justice of the peace may grant a warrant to arrest a man for further examination, without mentioning the crime of which he is accused; for it may not always be proper to let even the peace-officer know the crime of which the party to be arrested is accused.  
*2 Hawk.*  
*P. C. c. 13. § 11.*  
*[Qu. of such a warrant.]*

*2 Hawk.* If a person be arrested under the warrant of a justice of the peace, for a matter of which the justice had not jurisdiction, it is a false imprisonment in the justice.  
*P. C. c. 13. § 10.*

*2 Hawk.* If a sworn peace-officer arrest a person under the warrant of a justice of the peace in the precinct of which he is an officer, it is not necessary to shew the warrant.  
*P. C. c. 13. § 28.*

*Ibid.* But, if a person be arrested under such warrant by a person who is not a sworn peace-officer, or by a sworn peace-officer out of his precinct, and the warrant be not, upon a demand thereof at the time of arresting, shewn, it is a false imprisonment.

[It is enacted by 27 G. 2. c. 20. that in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying of any penalty by any act of parliament now in force, or hereafter to be made, or sum of money thereby directed to be paid, "the officer executing such warrant, if required, shall shew the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken."]

*2 Hawk.* If a peace-officer, after having arrested a man under a warrant of a justice of the peace, suffer him to go at large, and afterwards retake him under the same warrant, it is a false imprisonment.  
*P. C. c. 13. § 9.*

*Ibid.* The point is not quite settled: but it seems to be the better opinion, that, although a peace-officer cannot retake a person, whom he had before arrested under a warrant of a justice of the peace and suffered to go at large, under the same warrant, if the person voluntarily surrender himself, it is lawful for the peace-officer to detain him, and carry him before a justice of peace.

*Ibid.* Heretofore, if a peace-officer had arrested a person under the warrant of a justice of peace, for an offence of which it appeared, upon the face of the warrant, that the justice had not jurisdiction, it would have been a false imprisonment.

But by the 24 Geo. 2. c. 44. § 6. it is enacted, "That no action shall be brought against any constable or other officer, or against any person acting by his order and in his aid, for any thing

“ thing done in obedience to any warrant under the hand or seal  
 “ of any justice of the peace, until demand hath been made or  
 “ left at his usual place of abode in writing, signed by the party  
 “ intending to bring such action, of the perusal and copy of such  
 “ warrant, and the same had been refused or neglected for the  
 “ space of six days after such demand.”

## (E) For what Injuries to Personal Property an Action of Trespafs lies.

### 1. To live Property.

**I**T has been holden, that no person can have such property in a negro in *England*, as will enable him to recover the value of the negro in an action of trespafs, in case he be taken away; and that the master of the negro can only recover, as he may in the case of another servant, damages for the loss of service.

Ld. Raym.  
146.  
Chamberlain v.  
Harvey,  
Hil. 8 W. 3.  
Carth. 397.

It appears from another report of this case, that one question was, Whether the baptism of the negro, after taking him from his master, did not amount to an emancipation? But the court determined the case upon the general question, without giving an opinion as to this question.

In a still later case it was holden, that no person can have such a property in a negro in *England*, as will enable him to maintain an action of trover for the conversion of the negro; and in this case the authority of the case of *Butts v. Penny*, 2 *Lev.* 20. in which it had been holden that an action of trover will lie in such case, was denied.

Hargrave's argument in the case of *Sommerfet*, a negro. ]

If the sheep of *J. N.* be mixed with the sheep of *J. S.*, and *J. S.* chase them to the next convenient place for that purpose, in order to separate his sheep from the sheep of *J. N.*, an action of trespafs does not lie; for as they could not have been easily separated without it, the chasing was lawful.

Ld. Raym.  
1274.  
Smith v.  
Gould,  
Pasch.  
5 Ann.  
[Vide Mr.

If *J. S.* chase the beast of *J. N.* with a little dog out of land in the possession of *J. S.*, an action of trespafs does not lie; inasmuch as *J. S.* has an election to do this, or to distrain the beast.

566. J. pl. 15. 4 Rep. 38.  
Tirring-  
ham's case.  
2 Roll. Abr.  
1 Jon. 131.

But, if *J. S.* chase the beast of *J. N.* with a mastiff dog out of land in the possession of *J. S.*, and any hurt be thereby done to the beast, this action does lie; the chasing with such a dog being unlawful.

1 Freem.  
347, King  
v. Rofe.  
4 Rep. 38.  
Cro. Car. 254.

If a stranger chase the beast of *J. N.* out of land in the possession of *J. S.*, action of trespafs lies.

Bro. Tresp.  
pl. 421.  
Kelw. 46.

If the dog of *J. S.* kill a sheep the property of *J. N.*, an action of trespafs does not lie, unless *J. S.* knew the dog had been accustomed to bite sheep.

Dyer, 25.  
pl. 162.

12 Mod. 332. Mafon v. Reding. Ld. Raym. 608. S. C. If the owner of a very fierce dog suffer him to go about the streets unmuzzled, and the dog bite a man, an action of trespass does not lie, unless the owner knew the dog to be very fierce.

Fitz. N. B. 86. Bro. Tresp. pl. 407. Hob. 283. 36 G. 3. c. 124.] An action of trespass lies for taking or killing a dog; because, as a dog is a tame animal, there may as well be a property therein as in any other animal. Cro. Eliz. 125. Cro. Ja. 463. [3 Term Rep. 37. See also stat. 10 G. 3. c. 18.]

1 Freem. 347. King v. Rose. But, if while J. S. is chasing the beast of J. N. with a mastiff dog, in order to drive it out of land in the possession of J. S., J. N., to prevent mischief to his beast, kill the dog, this action does not lie.

Cro. Ja. 45. Sid. 336. This action does not lie for killing a dog found in a warren; because, such a dog is to be considered as a species of vermin.

3 Lev. 28. Barrington v. Turner. And it has been holden, that this action does not lie for killing a dog found in a park, although the dog might have been taken alive.

An action of trespass does not in the general lie for the taking or killing of a beast or a bird, which is *feræ naturæ*; because there is no property in either of these.

Bro. Detin. pl. 44. Bro. Tresp. pl. 407. But, if a beast or bird which is *feræ naturæ* have been reclaimed, this action lies for the taking or killing thereof; because there is a property in the beast or bird.

And an action of trespass does in some cases lie for taking or killing a beast or bird; although the beast or bird be *feræ naturæ*, and have not been reclaimed.

Fitz. N. B. 87. Godb. 123. Salk. 556. 11 Mod. 75. If a hare or coney be taken or killed upon the land of J. S., this action lies, although the land be not a warren, or the hare or coney have not been reclaimed; for J. S. has, by reason of its being upon his land, a local property in the hare or coney.

5 Rep. 104. Boulton's case. Cro. Car. 554. But, if a hare or coney be driven off the land of J. S. and killed by J. N., J. S. cannot in the general maintain this action; because the property, which was only a local one, is determined by driving the hare or coney off the land.

Godb. 123. Salk. 556. 11 Mod. 75. If, however, J. S. immediately pursue the hare or coney, which has been driven off his land and killed by J. N., it is not lawful for J. N. to carry it away; for by the immediate pursuit of J. S. the local property is continued.

Bro. Tresp. pl. 323. Cro. Eliz. 329. If the beast of J. S. have been unlawfully taken by J. N., an action of trespass does not lie for the retaking thereof by J. S., because J. N. was himself the first wrong-doer.

Bro. Tresp. pl. 323. And for the same reason, if the mare of J. S., which was unlawfully taken by J. N., afterwards drop a foal, an action of trespass does not lie against J. S. for the retaking of the mare, and the taking of the foal.



If the beast of *J. S.* have been seized for the use of the king, and *J. S.* even before office found retake it, an action of trespass lies; for by the seizure his property was divested. Bro. Tresp.  
pl. 357.

An action of trespass lies for the taking of a beast, although it be afterwards retaken by, or restored to, the owner: for the retaking or restoring in such case only goes in mitigation of damages. Bro. Tresp.  
pl. 221.  
2 Roll. Abr.  
560. pl. 3.  
pl. 6.

## 2. To dead Property.

If a ship have been wrecked, and the goods of *J. S.* which were in the ship be taken up by *J. N.*, *J. S.* cannot maintain an action of trespass; because *J. N.* did not obtain the possession of the goods tortiously, but by the act of God. Bro. Tresp.  
pl. 54.  
2 Roll. Abr.  
555. pl. 6.

If the goods of *J. S.*, which have been illegally taken in execution by a sheriff, are by the sheriff delivered to *J. N.*, this action does not lie; because the possession of the goods was lawfully obtained by *J. N.* Bro. Tresp.  
pl. 48.

If *J. S.*, in whom the general property in goods is, give or sell them to *J. N.*, but do not deliver them, and *J. N.* take them, an action of trespass does ~~not~~ lie; because, as *J. N.* did by the gift or sale acquire a property in the goods, he had a right to the possession of them. Bro. Tresp.  
pl. 124.  
pl. 303.  
Latch, 213.

But, if an infant, in whom the general property in goods is, give or sell them to *J. N.*, but do not deliver them, and *J. N.* take them, this action does ~~not~~ lie; because, as the general property of the infant was not divested by the gift or sale, the possession of the goods was tortiously obtained by *J. N.* Bro. Tresp.  
pl. 150.

If however an infant, in whom the general property in goods is, give or sell them, and also deliver them to *J. N.*, this action does not lie; because, although the general property of the infant was not divested by the gift, or sale and delivery, the possession of the goods by *J. N.* was obtained lawfully. Ibid.

If the bailee of goods give or sell them to *J. N.*, but do not deliver them, and *J. N.* take them, an action of trespass lies; because, as the gift or sale of a person who had only a special property in the goods did not transfer a property to *J. N.*, his possession of the goods was tortiously obtained. Bro. Tresp.  
pl. 216.

If a servant, who is empowered to sell the goods of his master, give them to *J. N.*, and deliver them, and *J. N.* carry them away, an action of trespass does not lie; because, as a power to sell goods implies a power to transfer a property in them, the possession of the goods by *J. N.* was lawfully obtained. Bro. Tresp.  
pl. 295.

But, if a servant, who has only the custody of his master's goods, give or sell them to *J. N.*, and deliver them, and *J. N.* carry them away, this action lies; because, as the servant had no power to transfer a property in the goods, the possession of the goods by *J. N.* was tortiously obtained. Bro. Tresp.  
pl. 295.

It seems to be the better opinion, that if the goods of *J. S.* be given or sold, and delivered by his wife to *J. N.*, and *J. N.* carry them away, an action of trespass does not lie; because, as a wife Bro. Bar.  
and Feme,  
pl. 36.  
Bro. Tresp.  
pl. 92.

has a power over the goods of her husband, the possession of *J. N.* was lawfully obtained.

*Str.* 820.  
*Leglife v.*  
*Champante.*  
[But in the court of Exchequer, Lord C. B. Bury, Montague, and Page, against Price, held, that where an officer has made a seizure, and there is an information upon it, &c. which goes in favour of the party, who afterwards brings trespass, the shewing these proceedings is sufficient to excuse the officer: it is competent to make out a probable cause for his doing the act. *Vin. Abr. tit. Evidence, (P. b. 6.)*—In actions of trespass against custom-house officers for taking goods, the *onus probandi* of non-payment of the duties lies upon the defendants. *Salomon v. Gordon, 2 El. Rep. 813. Henshaw v. Pleasance, Id. 1174.*]

*Blo. Tresp.* If the goods of *J. N.* are taken by a sheriff, who has a writ to  
*pl. 564.* levy of the goods of *J. S.*, an action of trespass lies; for the sheriff  
*2 Roll. Abr.* is at his peril to take care that he do not levy the goods of any  
*552. O.* other person than *J. S.*  
*pl. 3. pl. 9.*  
*Carth. 381.*  
[*Ackworth v. Kempe, Dougl. 40. S. P.*]

*Bro. Tresp.* If *J. S.* take the goods of *J. N.* to prevent them from being  
*pl. 213.* stolen or spoiled, an action of trespass lies; because the loss to  
*J. N.* would not, if either of these things had happened, have been irremediable.

*Bla.* But, if the goods of *J. N.* are in danger of being destroyed by fire, and *J. S.*, in order to prevent this, take them, this action does not lie; because the loss, if this had happened, would have been irremediable.

*Bro. Tresp.* It is said in one book, that an action of trespass does not lie for  
*pl. 415.* the taking of goods, after the person who took them has been indicted of felony and acquitted; for that, as *omne majus trahit ad se minus*, the trespass is extinguished in the felony.

*1 Jon. 150.* But it is in other books laid down, that if *J. S.*, who has been  
*Markham* indicted for feloniously taking the goods of *J. N.*, have been ac-  
*v. Cobb.* quitted, *J. N.* may maintain this action; because, as it does not  
*Litch, 144.* in this case appear from the record that the taking was felonious,  
*Noy, 82.* it seems highly reasonable that *J. N.* should recover the value of  
*Sty. 345.* his goods.

*1 Jon. 148.* An action of trespass does not lie for the taking of goods, for  
*150. Mark-* which an appeal of robbery has been brought; for a person,  
*ham v.* who has by bringing the appeal affirmed the taking to be  
*Cobb.* felonious, shall not afterwards be received to say that it was only  
*Litch, 144.* a trespass.  
*S. C.*

*1 Jon. 147.* It has been in one case holden, that if *J. S.* have been convicted  
*150. Mark-* or attainted of feloniously taking the goods of *J. N.*, *J. N.* can-  
*ham v. Cobb.* not, provided he did himself give evidence, or did procure any  
*Pasch. 1 Car.* person to give evidence against *J. S.*, maintain an action of tres-  
*Litch, 144.* pass; because he is in either case entitled under the 21 *H. 8.*  
*S. C.* *c. 11.* to a restitution of the goods.  
*Noy, 82.*  
*S. C.*

*2 Roll. Abr.* It is laid down in a subsequent case, that an action of trespass  
*557. Y. pl.* does lie in such case; for that, as the party robbed has done his  
*24. Dawkes* duty to the publick in prosecuting the thief, it is reasonable he  
*v. Cavenagh,* should have a remedy for the injury to himself.  
*Mich. 1652.*

It

It appears from the report of the former case, that the three justices were divided in opinion, whether an action of trespass does lie, where *J. S.*, who took the goods of *J. N.*, has been convicted or attainted of taking them feloniously; although no evidence were given against *J. S.* by *J. N.*, or by any person procured by him. *Doddridge, J.* and *Whitelock, J.* were of opinion, that where the party robbed has been a party to the prosecution, he is a party to the record of conviction or attainder by which the taking of the goods appears to have been felonious; and consequently he shall not be afterwards received to say, that the offence was only a trespass: but that, where the party robbed has not been a party to the prosecution, he may maintain an action of trespass; and the rather, because he would otherwise be without remedy; for the 21 *H. 8. cap. 11.* only gives restitution of the goods, "*where the felon is convicted, or otherwise attainted, by reason of the evidence given by the party robbed, or by any other by his procurement.*"—But *Jones, J.* was of opinion, that this action does not lie in either case. He admitted, that, if the party robbed bring an action of trespass before the conviction or attainder of the person who took them, the latter cannot plead, that he took the goods *animo furandi*; for that he shall not be suffered to defeat the action by such an explanation of his intention; but that, if it appear from a record, that the taking of the goods was felonious, this may be pleaded in bar of the action of trespass.

If *J. S.* extort money from *J. N.* an action of trespass lies; every act of extortion being a trespass.

If the obligor take away a bond from the obligee, an action of trespass lies.

An action of trespass lies against a rector or vicar for taking a coat of arms or a grave-stone out of his church; for neither of these is to be considered as an oblation.

If *J. S.* who has a deed belonging to *J. N.* in his power, tear off the seal, an action of trespass lies.

If a miller take toll of corn, whereof none ought to be taken, an action of trespass lies.

If *J. S.* draw wine out of the vessel of *J. N.* and afterwards fill up the vessel with water, an action of trespass lies; for by so doing the residue of the wine is damaged.

The owner of a several fishery may distrain nets found in his water, as being damage-feasant; but, if he cut them, an action of trespass lies.

If the master of a ship, in order to prevent her from sinking, throw goods overboard, an action of trespass does not lie; the doing of this being necessary for preserving the lives of the persons on board.

If the goods of *J. S.* which have been taken unlawfully by *J. N.* are taken by *J. S.*, an action of trespass does not lie; because *J. N.* was himself the first wrong-doer.

11 Jon. 147.  
Markham v.  
Cobb.  
Litch, 144.  
S. C.  
Noy, 82.  
S. C.

11 Mod. 137.  
Woodward's  
case.

2 Roll. Abr.  
557. D.  
pl. 1.

Bro. Tresp.  
pl. 181.

Bro. Tresp.  
pl. 29.

Bro. Tresp.  
pl. 47.

Fitz. N. B.  
83.

Cro. Car.  
228.  
Ravall v.  
Champernoon.

2 Roll. Abr.  
557. K.  
pl. 2.

Bro. Tresp.  
pl. 323.  
Cro. Eliz.  
329.

**Bro. Tresp.** If leather which was unlawfully taken from *J. S.* be made into shoes, an action of trespass does not lie against *J. S.* for taking the shoes.

**Ibid.** If a piece of timber which was illegally taken from *J. S.* have been hewed, this action does not lie against *J. S.* for retaking it.

**Ibid.** But, if a piece of timber, which was illegally taken, have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken; the nature of the timber being changed: for by annexing it to the freehold it is become real property.

**Ibid.** If the money of *J. S.*, which is not to be distinguished from the money of *J. N.*, have been illegally taken by *J. N.*, it is not lawful for *J. S.* to take any money from *J. N.*, because he cannot be certain that he takes his own money.

**Cro. Ja. 366.** If *J. S.* mix an unknown quantity of his corn or money with an unknown quantity of the corn or money of *J. N.*, and *J. N.* take the whole, an action of trespass does not lie; because it cannot be known how much thereof is the property of *J. S.*, and as the intermixing must have proceeded from a design of getting some of the corn or money of *J. N.* or from the folly of *J. S.*, it is very reasonable, that *J. S.* should in either case be punished with the loss of his own corn or money.

**Ward v. Ayre.** An action of trespass did heretofore lie, for distraining goods for money due for the relief of the poor, in case there were a defect in the authority, under which the distress was taken.

**2 Bull. 323.** But it is by 17 *Geo. 2. cap. 38. § 8.* enacted, "That, where any distress shall be made by an overseer for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect, or want of form, in the warrant of appointment of such overseer; or in the rate of assessment; or in the warrant of distress thereupon."

**Durrant v. Boys,** 6 Term Rep. 580. [It is not competent to a person to try an objection to a rate in an action of trespass against the officers who may distrain for the non-payment of the rate: the proper mode of proceeding in such case is by appeal.]

**Bro. Tresp.** An action of trespass lies for the taking of goods, although they are afterwards retaken by, or restored to, the owner: for the retaking or restoring only goes in mitigation of damages.

**pl. 221.**

**2 Roll. Abr.**

**569- pl. 3.**

**pl. 6.**

## (F) For what Injuries to Real Property an Action of Trespass lies.

### 1. To land.

**17 H. 6. 37.** **IF** a man, who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, an action of trespass does not lie; because the doing of this, it being necessary for the preservation of his life, is lawful.

**IF**

If *J. S.* go into the close of *J. N.* to succour the beast of *J. N.*, the life of which is in danger, an action of trespass does not lie; because, as the loss to *J. N.* if the beast had died would have been irremediable, the doing of this is lawful. Bro. Tresp. pl. 212.

But, if *J. S.* go into the close of *J. N.* to prevent the beast of *J. N.* from being stolen, or to prevent his corn from being consumed by hogs or spoiled, this action does lie; for the loss, if either of these things had happened, would not have been irremediable. *Ibid.*

If a tree the property of *J. S.* be blown down, and it fall upon the land of *J. N.*, and *J. S.* go upon the land to take it away, an action of trespass does not lie. *Ibid.*

But, if the loppings of a tree belonging to *J. S.* fall upon the land of *J. N.*, and *J. S.* go upon the land to take them away, this action does lie, provided the falling of them there might by using proper caution have been prevented. *Ibid.*

If the fruit of a tree belonging to *J. S.* fall upon the land of *J. N.*, and *J. S.* go upon the land to take it away, an action of trespass does not lie; because the falling of this there could not be prevented. Litch, 120.  
Millen v.  
Fawdry.

If *J. S.* walk without keeping in a footpath in the close of *J. N.* to look for a beast which he has lost, an action of trespass lies. 2 Roll. Abr.  
565. Top-  
lady v.  
Sealey.

But, if the beast of *J. S.* which has been stolen, be put into the close of *J. N.*, and *J. S.* go therein to take it away, this action does not lie. 2 Roll. Rep.  
55.

If *J. S.* have driven the beast of *J. N.* into the close of *J. S.*, or, if it have been driven therein by a stranger with the consent of *J. S.*, and *J. N.* go therein to take it away, this action does not lie; because *J. S.* was himself the first wrong-doer. 2 Roll. Abr.  
566. l. pl. 9.  
Cro. Eliz.  
329.

If *J. S.* chase the beast of *J. N.* which is damage-feasant in the close of *J. S.* into the ground of *J. N.* an action of trespass does not lie; because *J. S.* had a right to do this. Litch, 120.  
Millen v.  
Fawdry.

But, if a stranger chase the beast of *J. N.* which is damage-feasant therein, out of the close of *J. S.*, this action does lie; for by doing this, although it seem to be for his benefit, *J. S.* is deprived of his right to distrain the beast. Bro. Tresp.  
pl. 421.  
Kelw. 46. B.

If *A.* chase the beast of *B.* which is damage-feasant therein, with a little dog out of the close of *A.*, and the dog, notwithstanding the endeavour of *A.* to call it off, afterwards chase the beast into the close of *C.*, this action does not lie; for the chasing of it out of his close by *A.* was lawful, and it was not in his power to prevent it from being chased into the close of *C.* Litch, 199.  
Millen v.  
Fawdry.  
1 Jon. 131.

If a sheriff, who comes to replevy the beast of *J. S.* which is impounded in the close of *J. N.*, break down the fence of the close and enter that way, when he might have gone through the gate, an action of trespass lies. 2 Roll. Abr.  
552. O.  
pl. 7.

But, if, by reason of the threat of *J. N.* the sheriff fear his life will be in danger if he go through the gate, and in consequence 2 Roll. Abr.  
552. O.  
pl. 8.

of this he break down the fence of the close, and enter that way, this action does not lie.

12 Mod. 663. Valper  
v. Edwards.  
Salk. 248. If a beast have been distrained damage-feasant, an action of trespass does not lie for the damage done; for the possessor of the land, after having made his election to distrain, ought not to have another remedy for the same injury.

12 Mod. 663, 664. Valper  
v. Edwards.  
Id. Raym. 720.  
Salk. 248. As the beast, however, is in such case a mere pledge, and not a satisfaction for the damage done, if it die, or escape so as to be lost, without the default of the distrainer, this action does lie; because, as the detaining of the beast was owing to the default of the owner, in not making a satisfaction for the damage done, he ought to take the consequence of its dying or escaping.

12 Mod. 663, 664.  
665. Valper  
v. Edwards.  
Id. Raym. 720.  
Salk. 248. But, if the death or escape of the beast were owing to the default of the distrainer, he cannot maintain this action; for it would be very hard that the owner should, after losing his beast by the default of the distrainer, be liable to make satisfaction for the damage done.

Str. 1239. An action of trespass lies for erecting a stall in a publick market; for, notwithstanding every man has of common right the liberty of selling in such market, no man can erect a stall on the soil of another without his permission.

[1 Will. 107. S. C.]

Mayor, &c.  
of Norwich  
v. Swann, 2 Bl. Rep. 1116. [So, it lies for placing tables, stools, &c. in a market-place for sale without the leave of the owner of the soil.]

Bro. Tresp.  
pl. 342. If a person, who is bound to erect a building upon the land of *J. S.*, bring a carpenter, not being one himself, upon the land of *J. S.* to erect the building, an action of trespass does not lie; because the doing thereof is of necessity.

Bro. Tresp.  
pl. 260. If *J. S.* who is bound to repair a bridge, cannot do this without coming upon the land of *J. N.* an action of trespass does not lie for his coming thereupon; because the doing of this is necessary.

Bro. Tresp.  
pl. 342. But, if *J. S.* have commanded *A.* to deliver a beast to *J. N.*, and *J. N.* go into the close of *J. S.* to receive the beast, this action does lie; for, as the beast might have been delivered at the gate of the close, the going of *J. N.* thereinto is not necessary.

2 Roll. Abr.  
567. M.  
pl. 1. If *J. S.* have sold trees growing upon his land to *J. N.*, and *J. N.* go upon the land to cut and take them away, an action of trespass does not lie; the right of doing this being incident to the purchase.

Pro. Tresp.  
pl. 400. And for the same reason, if the land, on which trees growing are sold, be afterwards sold, and the vendee go upon the land to cut and take them away, this action does not lie.

2 Roll. Abr.  
564. H.  
pl. 1. pl. 2.  
J. Brownl.  
224. If a man, who was seised in fee of land, after having felled trees thereupon die, and his executor go upon the land within a reasonable time after his death to take them away, an action of trespass does not lie; because the law gives an executor a reasonable time to possess himself of the goods of his testator.

If

If *J. S.*, who has a right to a pipe which ferves as a water-course through the land of *J. N.*, come upon the land of *J. N.* and dig, in order to unstop or mend the pipe, an action of trespafs does not lie; for the right of doing both is incident to the right of pipe.

If a man go with men or horfes upon land, which lies contiguous to a navigable river, to tow a boat or barge, an action of trespafs does not lie; because the doing of this is for the publick good.

advanced cannot be supported as a general proposition: there is no common law right of navigable rivers: it can be supported only by usage. *Ball v. Herbert*, 3 Term Rep. 253.]

If *J. S.* dig upon the land of *J. N.* to raife a bulwark against a publick enemy, an action of trespafs does not lie; because the doing of this is for the safety of the publick.

If *J. S.* go into the ground of *J. N.* to beat or draw for a fox, badger, or any animal of the vermin kind, in order to hunt it, an action of trespafs lies.

But, if *J. S.* pursue a fox, badger, or any animal of the vermin kind, into the ground of *J. N.*, and hunt it there, this action does not lie; because the destruction of such animals is for the publick good.

If, however, the fox, of which *J. S.* is in pursuit, run to earth in the ground of *J. N.*, and *J. S.* dig it out, this action lies; for the fox might have been got out without digging.

The point is not perhaps quite settled; but it seems to be the better opinion, that if *J. S.* pursue an animal not of the vermin kind, into the ground of *J. N.*, an action of trespafs does lie, notwithstanding the animal was found in the ground of *J. S.*

It is in some books laid down, that if *J. S.*, who has started a hare in his own ground, pursue it into the ground of *J. N.* and kill it there, an action of trespafs does not lie; because the local property in the hare, which was in *J. S.*, is continued by the pursuit.

But it is laid down in other books, that although *J. S.*, who has flown a hawk at a pheasant in his own ground, is entitled thereto, if it be killed in the ground of *J. N.*, if he go upon the ground of *J. N.* to take it away, an action of trespafs lies. And it is in one book said, that all hunting, except for the destruction of vermin, is unlawful. If this be so, it follows, that every person, who hunts an animal not of the vermin kind in the ground of another, is liable to an action of trespafs.

If *J. S.*, who is entitled to corn growing upon the land in the possession of *J. N.*, go thereupon to cut and take it away, an action of trespafs does not lie; for *quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud*.

But, if *J. S.* do in such case go upon the land and cut the corn before it be ripe, this action lies; it being neither necessary nor proper that corn should be cut before it is ripe.

2 Roll. Abr.  
567. M.  
pl. 2.

Ld. Raym.  
725.  
Young's  
case.  
[The doc-  
trine here  
towing upon

Bro. Tresp.  
pl. 213.

2 Bulstr. 62.  
Cro. Ja.  
321.

2 Bulstr. 62.  
Cro. Ja.  
321.  
[Gundry v.  
334. S. P.]

2 Bulstr. 62.  
Cro. Ja.  
321.

11 Mod. 75.  
Godb. 122.  
Salk. 556.

Bro. Tresp.  
pl. 111.  
2 Bulstr. 61.

2 Bulstr. 61.

1 Inst. 56.

1 Ventr.  
222.  
Parrot v.  
Bridges.

Bro. Tresp.  
pl. 50.  
Pl. 325.  
Bro. Diff.  
pl. 12.

If the person, to whom tythe which has been set out belongs, go upon the land on which it is set out, and do what is necessary to prepare it for being carried away, an action of trespafs does not lie.

1 Inst. 161.  
2 Roll. Abr.  
566. l.  
pl. 12.

If *J. S.* be about to distrain a beast upon land holden of him, and the tenant, after *J. S.* has had a view of the beast upon the land, drive it, in order to prevent it from being distrained, into the land of *J. N.*, and *J. S.* follow to distrain it there, an action of trespafs does not lie.

5 Rep. 104.  
Boulton's  
case. Cro.  
Car. 554.

If *J. S.* make coney-boroughs in his own ground, and some conies bred therein do damage in an adjoining ground of *J. N.*, and *J. N.* kill them, an action of trespafs does not lie; because as *J. S.* had no property in the conies, which are *feræ naturæ*, after they were gone out of his own ground, he is not answerable for the damage done.

1 Inst. 122.  
Cro. Car. 554.

An action of trespafs lies for catching fish in a several fishery. Salk. 637.

1 Inst. 122.  
Cro. Car.  
554.  
Salk. 637.  
Smith v.  
Kemp.  
Carth. 286.  
Reg. 95.  
Fitz. N. B.  
88.  
[(a) In the  
case of  
Upton v.  
Dawkins,  
3 Mod. 97.  
Comb. 11.

It is laid down, that this action does not lie against a stranger for catching fish in a free fishery; for that, as divers persons have a right to fish therein, no one of them can maintain the action. But *Holt*, Ch. J. and *Dolben*, J. were of opinion, upon the authority of a writ in the register, that any one having a right to fish in a free fishery may maintain this action against a stranger (*a*), who has caught fish therein; and it was said by *Holt*, Ch. J. that a free fishery is a very different thing from a common fishery. *Giles Eyre*, J. was, however, of a contrary opinion, and *Carthew*, Serjeant, who moved in arrest of judgment, said, that many things contained in the writs in the register are not at this day law.

and *Pecke v. Turner*, cited in *Carth. 286.* in marg. it was holden, that trespafs would not lie for fishing in a free fishery. However, in the case of the Mayor of Orford v *Richardson*, 4 Term Rep. 439. 2 H. Bl. 182. where the declaration was in trespafs, there were counts for fishing in the free fishery, and no objection taken. *Idco quare.*]

3 Mod. 105.  
Anon.

An action of trespafs does not lie for fishing in a river where the tide flows; because, as the property in the soil of all such rivers is in the king, all persons have *primâ facie* a right to fish in them (*b*).

[(b) But a  
man may  
have, and  
may in an

action of trespafs reply to a general defence of this kind, an exclusive and appropriate privilege of fishing even in arms of the sea. Such right indeed is not to be presumed, but the contrary. It may however be established by prescriptive usage. 4 Burr. 2162. 4 Term Rep. 439. *Vide etiam Hale De Jure Maris*, c. 5.]

Bro. Tresp.  
pl. 186.  
9 Rep. 55.  
2 Roll. Abr.  
565. l. pl. 8.

If *J. S.*, by digging a ditch in his own land, divert water from the mill of *J. N.*, and thereupon *J. N.* go upon the land of *J. S.* and fill up the ditch with the earth which was digged thereout, an action of trespafs does not lie; because *J. S.* was himself the first wrong-doer.

Bro. Tresp.  
Pl. 345.

If *J. S.* have a right of common on a piece of land, and *J. N.* have a piece of land adjoining to the commonable piece which he is not bound to inclose, and the beast of *J. S.*, which was put upon



upon the commonable piece, go upon the land of *J. N.*, an action lies; for it was the duty of *J. S.* to have prevented this.

But, if *J. S.*, who ought to keep up a fence between a close of his and a close of *J. N.*, suffer the same to be out of repair, and the beast of *J. N.* go through the fence into the close of *J. S.*, this action does not lie; because the damage happens from the default of *J. S.*

If *J. S.* be driving a beast in a highway, which lies through an open field belonging to *J. N.*, and the beast go out of the highway and feed in the field, an action of trespafs lies; for *J. S.* might easily have prevented this.

But, if a beast, which is driving in such highway, do, against the will of the driver, bite a little of the corn or grafs which grows by the side of the highway, this action does not lie; because this could not easily have been prevented.

[The defendant with a little dog chased the plaintiff's sheep out of his ground, where they were trespassing, and drove them off his own ground. They went into another man's ground, which had no hedge to divide it from the defendant's grounds, which were contiguous. The dog pursued them into the other man's land, so next adjoining. The defendant, as soon as the sheep were out of his own land, called in his dog, and chid him. The owner of the sheep brought an action of trespafs for *chasing* his sheep. The court gave judgment, "*quod querens nil capiat per billam*;" being of opinion, that trespafs lay not in that case; for they held it to be an *involuntary* trespafs; whereas a trespafs that may not be justified ought to be done *voluntarily*. They thought he might lawfully drive the sheep out of his own land with his dog; and he did his best endeavour to recall the dog, when they were driven out of it; but the nature of the animal is such, that he cannot be recalled and withdrawn suddenly and in an instant. Therefore trespafs did not lie against him for what he had done.]

But, where a defendant entered into a close belonging to the plaintiff, where there was no footpath, and adjoining to his paddock, with guns and dogs; and one of the dogs ran into the paddock, and killed a deer; this was considered as an intentional trespafs, and not as a mere involuntary accident.]

## 2. To a Building.

If *J. S.* preach in the church of *J. N.*, without the consent of *J. N.*, an action of trespafs lies.

It is in the general true, that an action of trespafs lies for going into a man's house, although the door be open; for every man's house is his castle; and he is not obliged to keep the door shut.

If a mother go into the house of *J. S.*, the door of which is open, to see her daughter, a servant in the house, who is sick, this action lies.

If

Bro. Tresp.  
pl. 192.  
2 Roll. Abr.  
565. I.  
pl. 3.

Bro. Tresp.  
pl. 321.  
2 Roll. Abr.  
566. K.  
pl. 1.

Bro. Tresp.  
pl. 351.  
2 Roll. Abr.  
566. K. pl. 1.

Millen v.  
Faudrye,  
Poph. 161.

Beckwith v.  
Shordike,  
4 Burr.  
2092.

12 Mod.  
420. Turton v. Reynolds.

Plowd. 71.  
2 Roll. Abr.  
555. X pl. 1.  
Godb. 283.  
2 Roll. Rep. 203.

2 Roll. Abr.  
567. K. pl. 3.

20 E. 4. 7.  
Pl. 19. If a beaft, in driving it through a ftreet, go into the houfe of J. S., the door of which is open, this action lies.

Ero. Tresp.  
Pl. 43. If a man, whofe term in a houfe is expired, go into it, when the door is open, to take away goods left by him there, this action lies; for it was his own folly to leave the goods there.

2 Roll. Rep.  
55, 56. If J. S. go into the houfe of J. N., the door of which is open, to fearch for goods which he has loft, this action lies; although it be commonly reported, that the goods are in the houfe of J. N.

Higgins v. Andrews.  
2 Roll. Abr. 565. I. pl. 2.

But in fome cafes an action of trespafs does not lie for going into a houfe, the door of which is open.

Ero. Tresp.  
Pl. 118.  
Pl. 186.  
Cro. Eliz.  
246. 2 Roll.  
Rep. 56. 2 Lut. 1525. If J. S. have unlawfully gotten goods of J. N. into his houfe, and J. N. go thereinto, the door being open, to take them away, an action of trespafs does not lie; becaufe J. S. was himfelf the firft wrong-doer.

2 Roll. Rep.  
55, 56.  
Higgins v. Andrews. If goods of J. S. have been ftolen, and J. S. know that they are in the houfe of J. N. and J. S. go therein, the door being open, to take them away; this action does not lie.

Ero. Tresp.  
Pl. 16. If the perfon, in whom the reverfion of a houfe is, go thereinto, the door being open, to fee if any wafte be done, this action does not lie.

Plowd. 71.  
Kedwelle v. Brande. If J. S. go into the houfe of J. N., the door being open, to tender money, of which a tender to the perfon of J. N. is neceffary, this action does not lie.

Kelw. 46.  
Pl. 2. Anon. If a man go into a houfe, the door being open, to part two who are fighting, this action does not lie; the doing of this being for the publick good.

5 Rep. 91.  
Semaine's cafe. 3 Infl.  
162. Cro. Ja. 556. It is in the general true, that if a fheriff break open the door of a man's houfe, an action of trespafs lies.

1 Sid. 186.  
Penton v. Brown. 1 Keb. 658. And if a barn or an out-houfe be near unto or parcel of a houfe, the privilege of the houfe extends to it.

2 Sid. 186.  
Penton v. Brown. But, if a barn or an out-houfe ftands at a diftance from the houfe, the privilege of the houfe does not extend to it.

5 Rep. 93.  
Semaine's cafe. The privilege of a houfe, however, only extends to a houfe in a man's own poffeffion; for if the goods of J. S. are, to prevent them from being taken in execution, carried into the houfe of J. N., the fheriff may, after declaring the caufe of his coming, and demanding to have the door of the houfe opened, break it open to come at the goods.

But in fome cafes an action of trespafs does not lie againft a fheriff, for breaking open the door of a houfe.

5 Rep. 91.  
Semaine's cafe.  
4 Leon. 41. If, where the king is a party, the fheriff break open the door of a man's houfe, either to arreft him, or to execute a procefs, this action does not lie, provided he do, before he break open the door,

door, declare the cause of his coming, and demand to have it opened.

If a writ of *habere facias seisinam* of a house, or a writ of *habere facias possessionem*, even at the suit of a private person, be delivered to the sheriff, it is lawful for him, after declaring the cause of coming, and demanding to have it opened, to break open the door of the house to execute either of these; for after the judgment, on which either of these writs must be founded, the house is no longer to be considered as the house of the person in whose possession it is.

5 Rep. 92.  
Semaine's  
case.

If a commission of rebellion, which has issued from the court of Chancery against J. S. be delivered to the sheriff, it is lawful for him, after declaring the cause of his coming, and demanding to have it opened, to break open the door of a house, in which J. S. is, in order to arrest him.

Crompt. 47.

If a person who has been arrested escape into a house, it is lawful for the sheriff, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house, in order to retake him.

5 Rep. 92.  
Semaine's  
case. 2 Roll.  
Rep. 138.  
Palm. 54.

If a sheriff have entered into a house in order to execute a writ of *fieri facias*, it is lawful for him, after a demand to have it opened has been made, to break open any inner door or any trunk in the house,

2 Show. 87.  
Rex v. Bird,  
Palm. 54.  
[And the  
Cowan. 1.]

law is the same in case of *mesne process*. Lee v. Ganfel,

If, after a sheriff's officer has entered a house, in order to execute a writ of *fieri facias*, the master of the house lock the door, it is lawful for the sheriff, after a demand to have it opened has been made, to break it open, for the sake of setting the officer at liberty, or completing the execution.

Cro. Ja.  
555. Anon.

By the 21 J. a. c. 19. § 8. it is enacted, " That it shall be lawful to commissioners of bankruptcy, or the greater part of them, or to any person, by them or the greater part of them deputed by warrant under their hands and seals, to break open the house or houses, chambers, shops, warehouses, doors, trunks, or chests of the bankrupt where the said bankrupt or any of his goods shall be, or be reputed to be, and to seize the same."

By the 11 Geo. 2. c. 19. § 7. it is enacted, " That where any goods or chattels, fraudulently and clandestinely carried away by any tenant, lessee, or any person aiding or assisting therein, shall be put into any house, barn, stable, out-house, or place, locked up or otherwise secured, to prevent such goods or chattels from being taken as a distress for arrear of rent; it shall be lawful for the landlord, or any person empowered by him, to take as a distress for rent such goods or chattels (first calling to his assistance the constable or other peace-officer of the hundred, borough, parish, district, or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein, and in case of a dwelling-house, oath being first made before some justice of the peace, of a reasonable ground

" ground

“ ground to suspect that such goods or chattels are therein) in the  
 “ day-time; and to break open such house, barn, stable, out-house,  
 “ and place, and to take and seize such goods and chattels for the  
 “ said arrear of rent, as he might have done, if such goods or  
 “ chattels had been in any open field or place.”

5 Rep. 93.  
 Semaine's  
 case.  
 Moor, 606.

If a peace-officer, who has the warrant of a justice of the peace to arrest a man, in order to his finding surety for his good behaviour, after declaring the cause of his coming, and demanding to have it opened, break open the door of a house in which he is, in order to arrest him, an action of trespass does not lie.

2 Jon. 133,  
 134. Anon.

If a peace-officer have the warrant of a justice of the peace, for levying upon the goods of *J. S.* the penalty of a statute, part of which is given to the king, it is lawful for him, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house of *J. S.* in order to execute the warrant.

Bro. Fa. x.  
 Impr. pl. 6.  
 2 Hawk.  
 P. C. c. 14.  
 § 3.

If an affray in an house be seen or heard by a peace-officer, it is lawful for him, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in order to arrest the affrayers.

Bro. Faux.  
 Impr. pl. 6.  
 2 Hawk.  
 P. C. c. 14.  
 § 8.

If a person, who has, in the presence of a peace-officer, made an affray, flee into a house, it is lawful for the peace-officer, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in order to arrest him.

Bro. Tresp.  
 pl. 330.  
 2 Hawk.  
 P. C. c. 14.  
 § 7.

It is lawful for a private person, after declaring the cause of his coming, and demanding to have it opened, to break open the door of a house, in which a person who has committed a felony or given a dangerous wound is, in order to arrest him; the good of the publick requiring this to be done.

1 H.H.P.C.  
 579.  
 Fost. 321.

It is lawful for a peace-officer, having a warrant from a justice of the peace to arrest a person upon a suspicion of felony, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in which he is, in order to arrest him.

Bro. Tresp.  
 pl. 186.  
 2 Leon. 202.

If *J. S.*, who is unlawfully confined by *J. N.* in his house, in order to regain his liberty break open the door of the house, he is not liable to an action of trespass; because *J. N.* was himself the first wrong-doer.

Bro. Tresp.  
 pl. 186.

If *J. S.* through negligence suffer his house to take fire, and the person who lives in an adjoining house pull down the house of *J. S.* in order to preserve his own house, an action of trespass does not lie.

Comb. 417.  
 Lovey v.  
 Arnold.

An action of trespass does not lie for pulling down a house which is a nuisance in a highway.

## (G) Against whom an Action of Trespafs may be brought.

## 1. In the general.

**A**N action of trespafs may be brought against a lunatick, notwithstanding he is incapable of design; for wherever one person receives an injury from the voluntary act of another, this is a trespafs, although there were no design to injure.

Hob. 14.  
Weaver v.  
Ward.  
Bro. Tresp.  
pl. 213.  
pl. 310.

Latch, 13. 110.

Every party to a trespafs is liable to an action of trespafs; for there can be no accessary in trespafs.

Bro. Tresp.  
pl. 113.  
1 Lev. 124.

If *A.* command or request *B.* to take the goods of *C.*, and *B.* do it, this action lies as well against *A.* as against *B.*

Salk. 409.  
Britton v.  
Cole.

If *J. S.* agree to a trespafs which has been committed by *J. N.* for his benefit, this action lies against *J. S.* although it was not done in obedience to his command, or at his request.

Bro. Tresp.  
pl. 113.  
pl. 256.

But, if *J. S.* be compelled by *J. N.* to commit a trespafs, the latter is only liable to an action of trespafs; for no person can be guilty of a trespafs, unless he act voluntarily.

Sty. 65.  
Smith v.  
Slone.

If divers persons have been guilty of a trespafs, the party injured may bring an action of trespafs against them all, or against any one or more of them.

8 Rep. 159.  
Blacka-  
more's case.  
Bro. Tresp. pl. 20. pl. 150.

But, if the party injured by a trespafs have brought an action of trespafs against one of the parties to the trespafs, he cannot bring a second action against any one of them: for, although the defendant in the second action be a stranger to the record in the first, he may, being a party to the trespafs, plead the pendency of the first action in abatement of the second; or he may plead the acquittal or judgment in the first action in bar of the second.

Cro. Eliz.  
667.  
Ferrers v.  
Arden.  
6 Rep. 7.  
Carth. 96.  
Hob. 137.

If *J. S.* who has bailed a beast to *J. N.* for a time certain, take it away before the expiration of the time, he is not liable to an action of trespafs: for the person, who has only a special property in a chattel, can never maintain this action against him who has the general property: but the remedy of *J. N.* is an action upon the case.

Bro. Tresp.  
pl. 92.

If *J. S.* kill a beast, which has been bailed generally to him, an action of trespafs does not lie against *J. S.*; for by the bailment a general confidence was placed in him; and the remedy for an abuse of confidence is an action upon the case.

Bro. Tresp.  
pl. 275.  
5 Rep. 14.  
Cro. Eliz.  
14

But, if *J. S.* kill a beast, which has been bailed to him for a particular purpose, as to plough his land, he is liable to this action: because a general confidence was not placed in him by the bailment.

1 Inst. 57.  
Bro. Tresp.  
pl. 295.  
5 Rep. 13.  
Cro. Eliz. 704.

If a servant, who is intrusted to sell goods in his master's shop, carry any of them away, an action of trespafs lies; for the confidence

1 Leon. 87.  
Glosse v.  
Hayman.

dence placed in him extends only to the selling of the goods in the shop.

Bro. Tresp. pl. 295. If the goods of his master, with which a servant is intrusted, are injured by a mal-feasance of the servant, an action of trespass lies.

Rep. 14.  
5 Rep. 146.  
Ld. Raym. 188. But, if through the neglect of a servant, to whose care the goods of his master are committed, they receive an injury, this action does not lie: but the remedy, the injury arising from a non-feasance, is an action upon the case.

Bro. Tresp. pl. 211. If a servant, who by the command of his master has lawfully distrained a horse, use the horse, or kill it, the master is not liable to an action of trespass; but the servant, who by his own tortious act becomes a trespasser *ab initio*, is liable thereto.

1 Lev. 174.  
Baily v. Bunning.  
3 Lev. 192.  
1 Show. 12. If a sheriff's officer takes the goods of *J. S.* under a writ of *fiere facias*, after he has committed an act of bankruptcy, and afterwards the goods are assigned under a commission of bankruptcy; an action of trespass does not lie against the officer, although the goods do by relation become the property of the assignees from the time of committing the act: for, as the officer might not know that *J. S.* had committed an act of bankruptcy, or that an assignment of the goods would be made, and as it was his duty to execute the writ, it would be unreasonable to punish him as a wrong-doer.

Bro. Tresp. pl. 564.  
2 Roll. Abr. 552. O. If the goods of *J. S.* are taken by a sheriff's officer, who has a writ of *fiere facias* to levy of the goods of *J. N.* an action of trespass lies against him; because he was only authorized to take the goods of *J. N.*

Carth. 381.  
Hallet v. Burt. An action of trespass does not lie against a sheriff's officer, who under a writ of replevin has taken the goods of *J. S.* in the room of the goods of *J. N.*, because this writ is different from a writ of *fiere facias*. By the former, the officer is commanded to take certain goods therein specified: by the latter, he is only commanded to levy of the goods of *J. N.*

*Ibid.* But, if the owner of the goods, taken under a writ of replevin, claimed a property in them at the time of taking; and the officer, notwithstanding this claim, carried them away, without having the property determined upon a writ *de proprietate probanda*, this action lies against him.

10 Mod. 24.  
Templeman's case. If a stranger have officiously assisted a sheriff, or his officer, in the execution of a writ of *fiere facias* which issued upon a regular judgment, he is not liable to an action of trespass; for it is not only lawful, but it is the duty of every man, to assist in the execution of such writ.

Str. 509.  
Phillips v. Biron.  
Raym. 73. An action of trespass does not lie against a sheriff or his officer, or against a person who by the command of either of them has assisted him, for any thing done by virtue of a writ of *fiere facias* which issued upon an erroneous judgment: because the fault is not in such case in the sheriff or his officer, but in the court or some officer thereof.

But, if a stranger have officiously assisted a sheriff or his officer in the execution of such writ, he is liable to this action: because, as he acted voluntarily, it was incumbent upon him to take care, that there was a regular judgment to warrant the issuing of the writ.

Str. 509.  
Phillips v.  
Eiron.  
Raym. 73.

It is in one case said, that an action of trespass does not lie against a sheriff or his officer, or against a person who by the command of either of them has assisted him, for any thing done by virtue of a writ of *feri facias*, although there were no judgment to warrant the issuing of the writ; for as the sheriff and his officer, and the assistant, have only paid obedience to the writ, neither of them ought to be punished as a wrong-doer.

12 Mod.  
178.  
Britton v.  
Cole, Hil.  
9 W. 3.

But in a case soon after it was ruled by Holt, Ch.J. that, in an action of trespass against a sheriff for levying goods under a writ of *feri facias*, it is incumbent upon the sheriff to give in evidence a copy of the judgment upon which the writ issued.

Ld. Raym.  
733. Lake  
v. Billers,  
Hartford,  
Kent Assizes  
1698.

[The distinction seems to be this — if the action in such case be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of *feri facias* without shewing a copy of the judgment: but, if the plaintiff be not the party against whom the writ issued, but claim the goods by a prior execution or sale that was fraudulent, there, the officer must produce, not only the writ, but a copy of the judgment. For, in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass: but, in the other case, they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within the 13 Eliz. for which purpose it is necessary to shew a judgment. Bull. N. P. 234. 91. 5 Burr. 2631. Doug. 41. 2 Bl. Rep. 1104.]

It is laid down, in divers cases, that if *A.* take the goods of *B.*, and afterwards *C.* take them from *A.*, *B.* cannot maintain an action of trespass against *C.*; because *A.* did acquire a general property in the goods by the first taking, notwithstanding it was a tortious one; and consequently the property of *B.* was divested.

Bro. Tresp.  
pl. 256.  
pl. 329.  
pl. 358.

But it is said in one case, that *B.* may in such case maintain this action against *C.* for that *A.* did not acquire a general property in the goods by the first taking.

Sid. 438.

Heretofore, if a peace-officer had arrested a person under the warrant of a justice of peace, for an offence of which it appeared upon the face of the warrant that the justice had no jurisdiction, he would have been liable to an action of trespass.

2 Hawk.  
P. C. c. 14.  
10 Rep. 76.

But by the 24 Geo. 2. cap. 44. § 6. it is enacted, "That no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice, until demand hath been made in writing, signed by the party intending to bring such action, of the perusal and copy of such warrant, and the same hath been refused, or neglected, for the space of six days after such demand."

## 2. For an Injury to Real Property.

If the person, who has granted the vesture of land in which he has a freehold, disturb the grantee in the enjoyment thereof, an action of trespass lies against him.

Bro. Tresp.  
pl. 273.  
Dyer, 285.

But,

2 Roll. Abr.  
552. L.  
Pl. 4.

But, if *J. S.* have only a right of a free warren in the land of *J. N.*, and *J. N.* destroy coney-boroughs in the land, this action does not lie against *J. N.*, the remedy of *J. S.* being an action upon the case.

2 Inst. 105.  
Bro. Tresp.  
pl. 16.  
pl. 273. pl. 344. pl. 384.

It is in the general true, that an action of trespass lies against the lord of whom land is holden, for an injury done to the land.

2 Inst. 105.  
Str. 851.  
Sayer, 184.

But this action does not lie against the lord of whom land is holden for making a distress thereupon; it being by the statute of *Marlbridge* provided, that if a lord make an unreasonable distress, or make a distress when nothing is due to him, he shall not be liable to a fine, but shall be grievously amerced; whereas if this action would lie, he would be liable to a fine.

Finch. Law.  
lib. 3. c. 6.  
2 Inst. 105.  
Bro. Tresp.  
pl. 29. 344.  
2 Inst. 105.

It has been holden, that this statute extends to every lord of whom land is holden; although the tenant be only a tenant at will.

But, if a lord's bailiff make an unreasonable distress, or make a distress when nothing is due to the lord, this action lies against the bailiff; for the privilege of being exempted therefrom is confined by the statute to the person of the lord.

2 Inst. 106.

If the lord of whom land is holden drive a beast, which he has distrained upon the land of his tenant in one county, to the manor-pound in another county, he is not liable to an action of trespass; because, as the tenant is supposed to know where the manor-pound is, he knows where to carry sustenance for his beast.

2 Inst. 106.

If the lord of whom land is holden drive a beast, which he has distrained upon the land of his tenant in one county, to an open pound in another county, an action of trespass does not lie against the lord; but he is liable to an action upon the statute of *Marlbridge*; because, as the owner does not know to what pound the beast is driven, he does not know where to carry sustenance for it; and consequently the beast, no other person being obliged to do this, may be starved.

Salk. 638.  
Ashmead  
v. Ranger.

It was in one case holden by the court of King's Bench, that a tenant by copy of court-roll may maintain an action of trespass against his lord, for cutting down trees on the land holden by copy of court-roll; and the judgment of this court was affirmed in the Exchequer-chamber. But the judgment was afterwards reversed in the House of Lords; and it was said, that, as a copyholder cannot cut down trees, except for necessary repairs or for estovers, if his lord cannot do this, many good trees must perish, which would be a loss to the publick.

2 Roll. Abr.  
554.  
Holcombe  
v. Rawlins.  
Bro. Tresp.  
pl. 35. Cro. Eliz. 540.

If *A.* disseise *B.*, and *C.* disseise *A.*, and afterwards *B.* re-enter, he may maintain an action of trespass against *C.*, because by the re-entry of *B.* he reduces the possession to himself from the time of the first disseisin.

Ero. Tresp.  
Pl. 35. 302.

It is laid down, that if a disseisor make a lease or feoffment, and afterwards the disseisee re-enter, he cannot, although he thereby

reduce



reduce the poffeffion to himfelf from the time of the diffeifin, maintain an action of trespafs againft the leffee or feoffee; becaufe the leffee or feoffee came in by title.

But it has been holden in one cafe, that the diffeifee may, in fuch cafe, maintain this action againft the leffee or feoffee, notwithstanding the leffee or feoffee came in by title. And the former feems to be the better opinion; for it has been holden in two fubfequent cafes, that the diffeifee cannot, in fuch cafe, maintain an action of trespafs againft either the leffee or feoffee.

12 Ja. 1. Hetl. 66. Symons v. Symons, Hil. 3 Car. 1.

If a tenant for life of land die, and his executor go upon the land within a few days after his death, to remove the cattle of his teftator, an action of trespafs does not lie againft the executor; becaufe, as the time of the determination of the tenancy was uncertain, it is reasonable, that the executor fhould have a convenient time to remove the cattle.

If a leffee for life or years of land, who is not reftained from fo doing, cut down trees, an action of trespafs does not lie; becaufe the leffee has an intereft in the land by the act of the owner; and it was the folly of the owner, that he did not, when he demifed the land, reftain the leffee from cutting down trees.

*A.* demifed a pature to *B.* but the trees were excepted in the demife. The cattle of *B.*, which were afterwards put into the pature, barked the trees. It was ruled by *Holt Ch. J.* to whom the point was referred, that an action of trespafs did not lie againft *B.*

An action of trespafs does not lie againft a tenant at will for an injury to a building or the land by him holden, which arifes from a mere non-ufeance.

lop's cafe. 1 Inf. 57. Cro. Eliz. 784.

But, if a tenant at will cut down trees, or do any other pofitive injury to a land or a building by him holden, this action lies againft him; becaufe every fuch injurious act amounts to a determination both of his eftate and poffeffion.

1 Inf. 57. Bro. Tresp. pl. 362. Cro. Eliz. 784.

It is laid down in one cafe, that if the beaft of *A.* which is agifted by *B.* trespafs in the clofe of *C.*, it is in the election of *C.* to bring an action of trespafs againft *A.* or *B.*

But it is laid down in another cafe, that an action in fuch cafe lies only againft the agiftor of the beaft.

If a clofe in the poffeffion of *A.* lie contiguous to a clofe in the poffeffion of *B.*, and a clofe in the poffeffion of *C.* lie contiguous to a clofe in the poffeffion of *B.*, and a fence between the closes of *A.* and *B.* which *A.* ought to keep in repair, be out of repair; and a fence between the closes of *B.* and *C.* which *B.* ought to keep in repair, be likewise out of repair; and the beaft of *C.* efcape through the fence of *B.* and afterwards through the fence of *A.* into the clofe of *A.*, *A.* may maintain an action of trespafs againft *C.*, becaufe *A.* was only bound to keep his fence in repair againft the beafts which *B.* fhould put into his clofe, and not againft

Cro. Eliz.

540.  
Holcombe  
v. Rawlins,  
Hil. 39 Eliz.  
11 Rep. 51.  
Liford's  
cafe, Mich.

Cro. J.

205.  
Stodden v.  
Hervey.

5 Rep. 13.  
The Coun-  
tiffs of Sa-  
lop's cafe.  
Bro. Tresp.  
pl. 430.

Ld. Raym.  
739.  
Glenham v.  
Hanby.

5 Rep. 13.  
The Coun-  
tiffs of Sa-  
lop's cafe.

5 Rep. 13.  
The Coun-  
tiffs of Sa-  
lop's cafe.

1 Inf. 57. Bro. Tresp. pl. 362. Cro. Eliz. 784.

2 Roll. Abr.  
546. B.  
pl. 1.

Clayt. 33.  
Batemon  
cafe.

Bro. Tresp.  
pl. 439.  
Jenk. Cent.  
161.  
1 Freem.  
379.

the beasts of all persons which should come into the close of *B.* But, as the damage which *C.* sustains by the recovery of *A.* against him is owing to the default of *B.* in not keeping his fence in repair, *C.* may recover a satisfaction in an action upon the case against *B.*

2 Roll. Abr.  
553. Q.  
Pl. 1.

If a servant, without the knowledge of his master, put his master's beast into the close of *J. S.* this action does not lie against the master; because, by taking upon himself to do this, the servant did acquire a special property for the time in the beast: but the servant is, in consequence of the special property by him acquired, liable to this action.

Ibid.

But, if a wife, without the knowledge of her husband, put her husband's beast into the close of *J. S.* an action of trespass lies against the husband; because a married woman cannot acquire any property in the goods of her husband.

### (H) In what Court an Action of Trespass may be brought.

2 Inst. 311,  
312.

**A**T the common law the superior courts had not jurisdiction in an action, unless the debt or damages amounted to forty shillings.

By the statute of *Gloucester*, c. 8. it is in affirmance of the common law enacted, "That no person shall from henceforth have a writ of trespass before the justices, unless he swear by his faith, that the goods taken away were worth forty shillings at the least."

2 Inst. 311.

The sanction of an oath was by this statute added, for the sake of more effectually confining actions in which the damages were under forty shillings to inferior courts: but, the consequences of obliging a plaintiff to take an oath of this kind being found very dangerous, the practice of requiring an oath was soon discontinued.

1 Inst. 118.  
2 Inst. 311,  
312.  
Fitz. N. B.  
47.  
Corth. 108.  
Lambert v.  
Thurston.

It is in divers books laid down, that although the statute of *Gloucester* speaks of a writ of trespass generally, it only means a writ of trespass upon the case; because no inferior court can hold plea of trespass with force. And the doctrine of these books is recognized in a modern case. In an action of trespass, which was brought in the court of King's Bench, the damages laid in the declaration were only twenty shillings. Upon a demurrer it was objected, that the court had not a jurisdiction, the damage appearing upon the face of the declaration to be under forty shillings: but the objection was over-ruled. And by the court—If an action for a trespass with force, in which the damage is under forty shillings, do not lie in a superior court, the party injured would be without redress; for a fine cannot be assessed by an inferior court, and consequently an action of trespass does not lie in an inferior court.

By the 5 *W. & M.* c. 12. it is enacted, "That from henceforth no writ, commonly called a *capias pro fine*, shall issue against any

“ any defendant, againſt whom judgment has been entered up in  
 “ an action of trespafs *vi et armis*. But the ſame fine is and ſhall  
 “ be hereby remitted and diſcharged.”

Since the making of this ſtatute it has been the practice of the court of Common Pleas, to infer the words *nihil de fine quia remittitur per ſtatutum*, in entering up judgment in an action of trespafs. Salk. 54.

But a queſtion ariſing in the court of King's Bench, ſoon after the making of this ſtatute, in what manner judgment in an action of trespafs ought to be entered up, it was after debate holden, that the claufe *quod capiatur pro fine* ought to be entirely omitted, for that, as the ſtatute has diſcharged the fine, no notice ought to be taken thereof in entering up judgment. Carth. 390.  
Linſey v. Clerk,  
Mich. 8 W. 3.  
Salk. 54.

In a caſe not long after in the ſame court it is ſaid by two reporters to have been holden, that the claufe *quod capiatur pro fine* ought ſtill to be infered, in entering up judgment in an action of trespafs. Ld. Raym.  
273.  
Courtney v. Collet.  
Mich. 9 W. 3. 12 Mod. 164. S. C.

But this is probably a miſtake in theſe reporters, for another reporter of the ſame caſe is ſilent as to the point; and it ſeems extremely ſtrange, that the ſame court ſhould ſo ſoon after, and without taking the leaſt notice thereof, depart from what was ſolemnly determined in the caſe of *Linſey v. Clerk*. Carth. 436.

Although the fine due to the crown be by the 5 W. & M. c. 12. taken away, and the claufe *quod capiatur pro fine* be omitted in entering up judgment in an action of trespafs, this action does not even at this day lie in an inferior court.

For by the ſame ſtatute, § 2. it is enacted, “ That the plaintiff  
 “ in every action of trespafs *vi et armis* ſhall upon ſigning judgment therein, over and above the uſual fees, pay to the proper officer who ſigneth the ſame the ſum of fix ſhillings and eight pence, in full ſatisfaction of the fine due to the crown, and of all fees due for or concerning the ſame, to be diſtributed in ſuch manner as fines and fees of this kind have uſually been.”

As a ſum of money is to be paid in ſatisfaction of the fine due to the crown, and this is to be diſtributed in the ſame manner as the fine had uſually been diſtributed, it follows, that only ſuch courts, as could before the making of this ſtatute have aſſeſſed a fine, are capable of receiving money in lieu of the fine, or of diſtributing it as the money heretofore paid as a fine had been uſually diſtributed; and, conſequently, that an action of trespafs does not at this day lie in an inferior court.

## ( I ) Of the Pleadings in an Action of Trespafs.

### I. Of the Writ.

IT is laid down in divers books, that, if the words *vi et armis* are omitted in a writ of trespafs, the writ abates; for that theſe are words of ſubſtance. Fitz. N. B.  
86. Cro.  
Ja. 443.  
Salk. 636.

525. 536. Cro. Car. 407.

1 Saund. 81.  
Law v.  
King, Trin.  
19 Car. 2.

It has indeed in one modern case been holden, that the words *vi et armis* are words of form, and consequently that the writ does not abate on account of their being omitted.

7 H. 6. 13.  
1 H. 7. 19.

The determination in this case seems to have been founded upon what is laid down in two old cases. In these it is laid down, that if, upon a demurrer to a special plea in an action of trespass *vi et armis*, the court shall give judgment for the defendant as to the matter specially pleaded, there shall be no further inquiry concerning the force, although issue have been thereupon joined. It is in these likewise laid down, that if the court shall give judgment upon the demurrer for the plaintiff as to the matter specially pleaded, the issue joined upon the force shall not be tried: but a *capias pro fine* shall as well be awarded, as if this issue had been found for the plaintiff.

The determination in the case of *Laro v. King* is not warranted by the two old cases. All that can be fairly inferred from them is, that, if there be judgment upon the demurrer that the act justified was lawful, it shall be intended that the force accompanying it was also lawful; or that, if there be judgment upon the demurrer that the act justified was unlawful, it shall be intended that the force accompanying it was also unlawful. The consequence of this inference is, that it would in either case be quite nugatory to try the issue joined upon the force: but it does by no means follow, that the words *vi et armis* are words of form.

Ld. Raym.  
985. Day  
v. Musket.

It is said by *Holt*, Ch. J. that since the making of the statute of the fifth of *W. & M. c. 12.* it is not necessary to insert the words *vi et armis* in a writ of trespass; because the writ of *capias pro fine*, which before issued upon a judgment against the defendant in an action of trespass, is thereby taken away.

But this *dictum* seems not to be well founded. For by the same statute, § 2. it is enacted, “ That the plaintiff in every action, wherein a *capias pro fine* would before the making thereof have issued, shall upon signing judgment in such action, over and above the usual fees for the signing thereof, pay to the proper officer who signeth the same the sum of six shillings and eightpence, in full satisfaction of the fine due to the crown, and of all fees due for or concerning the same, to be distributed in such manner as fines and fees of this kind have usually been.”

It can never be fairly inferred from this statute, that the necessity of inserting the words *vi et armis* in a writ of trespass is thereby taken away. On the contrary, the insertion of these words seems to be still quite necessary, in order to let in the provisions of the statute, for the payment and distribution of the money, which is to be paid in lieu of the fine thereby discharged.

It is moreover enacted by the 16 & 17 Car. 2. c. 8. § 1. “ That, if any verdict of twelve men shall be given in any action, in any of his majesty’s courts of record at *Westminster*, or in the courts of record in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in his majesty’s courts of great sessions in *Wales*, judgment

“ judgment thereupon shall not be stayed or reversed for default  
 “ or lack of form, or by reason of the omission of the words *vi*  
 “ *et armis*; provided the cause has been tried by a jury of the pro-  
 “ per county or place where the action is laid: but such omission  
 “ shall be amended.”

This clause amounts to a legislative declaration, that the words *vi et armis* in a writ of trespass are words of substance: for, as all defaults in matters of form are by the former general words of this clause declared to be after a verdict amendable; if these are words of form, it is quite nugatory to declare again, that the omission of the words *vi et armis* in a writ of trespass shall after a verdict be amended.

If a writ of trespass do not conclude *contra pacem*, it abates; for, as every trespass with force is a breach of the peace as well as a private injury, these are words of substance. Fitz. N. B. 93.  
Carth. 66.  
Salk. 636.

If a writ of trespass be sued out in the time of the king that now is, for a trespass committed in the time of a deceased king, the conclusion must be *contra pacem* of the deceased king. 1 Show. 28.  
Salk. 641.  
Day v. Musket.  
[Rex v. P. C. 138.]

The omission of the words *contra pacem* in a writ of trespass is amendable after a verdict. For by the 16 & 17 Car. 2. c. 8. § 1. it is enacted, “ That, if any verdict of twelve men shall be given  
 “ in any action, in any of his majesty’s courts of record at *West-*  
 “ *minster*, or in the courts of record in the counties palatine of  
 “ *Chester*, *Lancaster*, or *Durham*, or in his majesty’s courts of great  
 “ sessions in *Wales*, judgment thereupon shall not be stayed or  
 “ reversed by reason of the omission of the words *contra pacem*;  
 “ provided the cause has been tried by a jury of the proper coun-  
 “ ty or place where the action is laid: but such omission shall be  
 “ amended.”

## 2. Of the Declaration.

### 1. In the General.

As the complaint in a writ of trespass is general, divers trespasses may be alleged in the declaration upon one writ. Gillb. Hist. C. P. 3.  
Bro. Tresp. pl. 112.

And for the same reason, trespasses in different vills may be alleged in the declaration upon one writ; provided the different vills are in the bailiwick of the sheriff to whom the writ is directed. 2 Lill. Pr. Reg. 728.

The plaintiff in an action of trespass against several persons for a joint trespass, may declare against every one of them separately. Str. 420.  
Bayly v. Raby and others. [5 Term Rep. 649.]

But, if it appear upon the face of the declaration in an action of trespass, that another certain person, as well as the person against whom the action is brought, was a party to the trespass, the declaration is bad for want of having made that person a defendant. [Hob. 199.]

1 Leo. 41.  
Henley v.  
Broad.

A declaration in an action of trespass was holden to be bad; because the allegation was, that *A. simul cum B.* committed the trespass, and the action was brought against *A.* only.

But it was in this case laid down, that if it be alleged in the declaration in such action, that *A. simul cum* another person to the plaintiff unknown committed the trespass, the declaration is good; because it is not in the plaintiff's power to make an unknown person a defendant.

2 Bulstr.

215.

Sherland v.  
Heaton.

2 Lev. 206.

2 Show. 27.

295. Salk. 636. Ld. Raym. 1413. 1151, 1162.

If the declaration in an action of trespass be in these words, *quod cum* the defendant did the thing complained of, it is bad: because these words, which are only by way of recital, do not amount to an affirmative charge.

Salk. 636.

Hore v.

Chapman.

If the declaration in an action of trespass be in these words, *quare* the defendant did the thing complained of, it is bad; inasmuch as the charge, where the word *quare* is used, it being a word of interrogation, is less affirmative, than where the words *quod cum* are used.

Warren v.

Lapdon,

Barnes, 249.

[Douglas v.

Hall, 1 Willf.

99. Barnes, 452. S. C.]

It has been holden in the court of Common Pleas, that although the words *quod cum*, or the word *quare*, be used in the count in an action of trespass, the fault is cured by the writ, which is in this court part of the declaration.

1 Barn. 176.

Clarke v.

Lucas.

[Qu. the  
authority in  
Barnes.]

It seems however to have been doubted by the court of King's Bench, whether there are in the writ of trespass words sufficiently affirmative to cure the defect of affirmation in the count, occasioned by the words *quod cum*, or *quare*: for in a case not many years before that of *Warren v. Lapdon*, wherein it had been holden by the court of Common Pleas that there are, which came before the court of King's Bench upon a writ of error, the latter court never came to a determination.

MS. R.

Smith v.

Reynolds,

Trin 10 G. 2.

in K. B.

[Andr. 21.

S. C.

Bateman

v. Fowler,

1 Barnard,

B. R. 423. White v. Shaw, 2 Willf. 203]

But, whatever doubt there may formerly have been in the court of King's Bench as to this point, it is now at an end; for in a case subsequent to the case of *Clark v. Lucas* it is laid down, that in the court of Common Pleas the words in the writ of trespass are sufficiently affirmative to cure the defect of affirmation in the count, occasioned by the words *quod cum* or *quare*; [and this, even on a special demurrer.]

Str. 1151.

Wilder v.

Handy.

Marshall v.

Rigs,

Id. 1162.

It has in two cases been holden by the court of King's Bench, that the declaration in an action of trespass, which is bad by reason of the words *quod cum*, or the word *quare*, being therein contained, may be amended from the bill filed; provided this be sufficient to warrant the amendment; and that the court will not inquire into the time of filing the bill.

Dobs v.

Edmonds,

2 Str. 681

[The plaintiff declared in trespass with a *quod cum*, and then went on to another trespass, which was introduced with a *necnon de eo quod*, &c. The verdict was *pro quer.* as to the last part, and *pro*

*pro def.* as to the trespasss under the *quod cum*. It was moved in arrest of judgment, that the whole was but recital. *Sed per cur.* — We must not extend that exception, which has gone far enough already: the latter part is by way of positive charge, and the finding of the jury has cured it as to the first. The plaintiff must have judgment.]

The words *vi et armis* ought to be inserted in the declaration in an action of trespasss.

But the declaration is not bad for want of these words, if the action be brought in the court of Common Pleas; because, as the writ is in this court part of the declaration, the want of these words in the count is cured by their being in the writ.

The omission of the words *vi et armis* in the declaration in an action of trespasss, although not otherwise cured, is amendable after a verdict: it being by the 16 & 17 Car. 2. c. 8. § 1. enacted, "That, if any verdict of twelve men shall be given in any action, "in any of his majesty's courts of record at *Westminster*, or in "the courts of record in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in his majesty's courts of great sessions in "Wales, judgment thereupon shall not be stayed or reversed by "reason of the omission of the words *vi et armis*; provided the "cause has been tried by a jury of the proper county or place "where the action is laid: but such omission shall be "amended."

the declaration, and the memorandum is of an action of trespasss on the case. *Savignac v. Roome*, 6 Term Rep. 125.]

The venue in an action of trespasss may be laid in a hamlet.

It is in the general true, that the injury, for which an action of trespasss is brought, must be specially alleged in the declaration. But, if the injury arise *ex turpi causa*, as from the debauching of a man's daughter, it is not necessary to allege this specially; because the doing thereof would introduce obscenity into the record.

It is laid down in two books, that the declaration in an action of trespasss, for taking or injuring a beast or fowl *feræ naturæ*, must shew, that the beast or fowl was reclaimed; for unless it were reclaimed, there could be no property therein.

But it has been holden in one case, that although it be necessary to shew this in an action of *trover* for the beast or fowl, it is not necessary to do it in an action of trespasss.

The former however seems to be the better opinion; for in a subsequent case it is laid down, that if an action of trespasss be brought for killing a deer, it must appear in the declaration, that the defendant knew the deer to be tame.

It must be alleged in the declaration in an action of trespasss, for an injury done by a bite of the defendant's dog, that the defendant knew the dog was accustomed to bite; because a dog is not by nature a fierce or dangerous animal.

Salk. 636.  
Cro. Ja.  
443.

1 Sid. 187.  
Jones v.  
Pritchard.  
Lutw. 1510.

[Note; this act applies only to those cases that appear on the very face of the declaration to have been evidently intended to be actions of trespasss; not to those cases, where the frame of

Bro. Tresp.  
pl. 115. pl. 371.

Sid. 225.  
Sippora v.  
Basset.  
Cro. Ja. 534.

Fitz. N. B.  
86.  
Dyer, 306.

Cro. Car. 18.  
Vincent v.  
Lesney,  
Mich. 1 Car. 1.

Lutw. 1359.  
Atkinson v.  
Hunter,  
Pacth.  
3 Ja. 2.

Ld. Raym.  
608. Mason  
v. Keeling.  
12 Mod.  
335. 1 Freem. 534.

Lutw. 50.  
Bayntine  
v. Sharp.  
Salk. 662.  
Ld. Raym.  
110, 1583.

For the same reason, if this action be brought for an injury done by a goring of the defendant's bull, it must be alleged in the declaration, that the defendant knew the bull had before gored some person.

1 Freem. 434.

Ld. Raym.  
1583. Rex  
v. Huggins.  
12 Mod.  
335.

But, if this action be brought for an injury done by a beast belonging to the defendant, which is by nature fierce or dangerous, as a tiger or lion, it is not necessary to allege, that the defendant knew the beast had before hurt some person; because the owner must at his peril keep a beast of this kind confined.

Sid. 184.  
Glascock v.  
Morgan.

It is laid down, that if it appear upon the face of the declaration in an action of trespass, for taking or injuring goods, that the goods were in the possession of the plaintiff, this is sufficient, although it be not expressly alleged that they were in his possession.

2 Lev. 20.  
156. Cro.  
Ja. 46.

It has in divers cases been holden, that it must be expressly alleged in the declaration in an action of trespass, for taking or injuring goods, that the plaintiff had a property in the goods.

2 Show.  
395.  
Dannet v.  
Collingdell.

The declaration in this action charged the taking of the beasts of the plaintiff, viz. one horse and one hat. The judgment was arrested; because it was not alleged, that the property in the hat was in the plaintiff.

Salk. 640.  
Joce v.  
Mills.

The declaration in this action charged the breaking of the plaintiff's close, and taking of two horses there being, and a hundred bushels of oats of the goods of the plaintiff there also being. This declaration was holden to be bad; because as one sentence thereof is closed by the words *there being*, the words of the proper goods of the plaintiff in the following, notwithstanding the two sentences are connected by the copulative *and*, do not extend to the two horses.

1 Ventr.  
278.  
Holland v.  
Ellis.  
2 Lev. 156.  
Ld. Raym.  
239.  
Fontleroy v.  
Aymer.

The declaration in this action, which charged the breaking of the plaintiff's close, and the taking of several loads of corn there being, was holden to be insufficient; because it was not expressly alleged, that the corn was the corn of the plaintiff.

But it is in another case said, that the judgment in the case of *Holland v. Ellis* was arrested merely upon the authority of the precedents; for that *Hale*, Ch. J. said, that if it had been a new case, he should have been of a contrary opinion; for that as the close was alleged to be the property of the plaintiff, it ought *prima facie* to have been intended, that the corn there being was his also.

*Ibid.*

And in the latter case, wherein the declaration charged a fishing in the plaintiff's several fishery, and the taking of fish, the court inclined strongly to be of opinion, for the reason given by *Hale*, Ch. J., in the case of *Holland v. Ellis*, that the declaration was good, although it was not expressly alleged, that the fish were the fish of the plaintiff; for that this ought to be intended.

1 Sid. 137.  
Jones v.  
Pritchard.  
Lutw. 1510.

If an action of trespass be brought in the court of Common Pleas, for taking or injuring goods, it is not necessary to allege in the count, that the goods were the property of the plaintiff, provided

this



this be alleged in the writ; for the writ is in this court part of the declaration.

It has been holden, that if some of the goods, charged in the declaration in an action of trespass to have been taken or injured, be alleged to be the property of the plaintiff, and others be not, and there be a verdict for the plaintiff, he may enter a *remittitur* as to those goods which are not alleged to be his, and have judgment as to the residue. -

It is not necessary for the plaintiff in an action of trespass to shew in his declaration, by what means his property in the goods charged to have been taken or injured was acquired.

The quality and quantity of the personal chattel, charged to have been taken or injured, must be shewn in the declaration in an action of trespass with convenient certainty; otherwise the defendant cannot plead a recovery in a former action, in case a second action be brought for taking or injuring the same chattel (a).

Str. 637. [2 Ld. Raym. 1007. 4 Burr. 2455. (a) The true reason is, that the defendant may be enabled to justify. He cannot justify taking *divers* goods, not particularized. 4 Burr. 2455.]

The declaration in an action of trespass, which only charged the taking of cattle, was holden to be bad; because it did not shew of what species the cattle were.

But the declaration in this action for taking a hawk was, although it did not mention the particular kind of hawk, holden to be certain enough.

It was holden, that the declaration in an action of trespass for taking a parcel of yarn was bad; because the quantity of yarn was not shewn.

The plaintiff in an action of trespass declared for breaking his close, and digging and carrying away two acres of his land. The declaration was holden to be bad; because, although it shew the extent of the land in which the digging was, it does not shew the quantity of the soil which was digged and carried away.

But, if the declaration in this action charge, that the defendant's beast broke the close, and eat the peas of the plaintiff, this is sufficient: it being in such case almost impossible to shew the quantity of the peas eaten.

The plaintiff in an action of trespass declared for breaking and entering his house, and taking several keys belonging to the locks upon the doors of the house. It was insisted, that the declaration, which did not shew either the kind or number of the keys, was bad: but it was holden to be good. And by the court—The keys are sufficiently ascertained by the reference to the locks upon the doors of the house.

The declaration in an action of trespass charged the breaking of the plaintiff's close, and the cutting down of his thorns to a certain value. At first the court inclined to be of opinion that this declaration was bad; because it did not shew the quantity of the

2 Saund.  
379.  
Pinkney's  
case.  
Raym. 395.  
Cutforthay  
v. Taylor.

2 Bulstr.  
288.  
Willamore  
v. Bamford.

5 Rep. 346.  
Playter's  
case.  
2 Inst. 435.  
1 Ventr. 53.  
2 Salk. 628.  
Ld. Raym.  
1410.

2 Lutw.  
1374.  
Dale v.  
Phillipson.

Cro. Car. 18.  
Vincent v.  
Lefney.

2 Lev. 195.  
Wade v.  
Hatcher.

2 Vent. 174.  
Highway v.  
Derby.

Gilb. Hist.  
C. P. 122.

Salk. 643.  
Layton v.  
Grindall.

Cro. J. 435.  
Johns v.  
Wilson.

the thorns : but afterwards, upon looking into precedents, judgment was given for the plaintiff.

Hobs v.  
Green.  
Barnes.

The declaration in an action of trespass charged the breaking and entering of the plaintiff's house, and the carrying away of divers quantities of china-ware, earthen-ware, and linen, without setting forth the particular quantity of china-ware, earthen-ware, or linen : on a motion in arrest of judgment, this declaration was holden to be certain enough.

Chamber-  
lain v.  
Greenfield,  
3 Will. 292.

[Upon the authority of the preceding cases, it was adjudged on a special demurrer in trespass for breaking and entering a house, damaging the goods and chattels, wrenching and forcing open the doors, &c., that it was not necessary to specify the goods and chattels, or to state the number of doors forced open. The essential matter of the action was the breaking and entering of the house; every thing else was merely matter of aggravation, and therefore need not be specified.]

1 Bull. 47.  
Pollard v.  
Caly.  
Hard. 407.  
Yelv. 147.

It is not necessary to shew in the declaration in an action of trespass, brought against a stranger for obstructing a way claimed by the plaintiff over the ground of *J. N.* a title to the way; because, as the claim is only of an easement, it is sufficient, as against a stranger, to shew a possession thereof.

Str. 6.  
Vernon v.  
Goodrick.  
[(a) In an  
action of  
trespass *vi et  
armis*, (and  
that is the

But, if an action be brought against *J. N.* for obstructing a way claimed by the plaintiff over the ground of *J. N.*, the plaintiff must shew in his declaration a title to the way (a); for, although it be sufficient to allege the possession of an easement in such action against a stranger, this is not sufficient in an action against the owner of the ground.

action we are now considering,) it can in no case be necessary to set forth a title in the declaration; nor does the case referred to warrant such a position. The point determined there was, that if the defendant plead *liberum tenementum*, it is not sufficient for the plaintiff in his replication barely to traverse the defendant's title; he must shew his own title. The author has confounded actions of trespass *vi et armis* with actions of trespass *on the case*. The doctrine advanced in the text, and the clause immediately preceding and subsequent to it, will be found to be applicable only to the latter species of action; and a careful examination of the cases will satisfy us, that the court had in view that species of action only.]

Hard. 407.  
Yelv. 147.

If an action of trespass be brought against a stranger, for obstructing the plaintiff in the enjoyment of a right of common claimed in the ground of *J. N.*, the declaration must shew a title to the common; inasmuch as the claim in this case is of an interest in the ground of another.

Cro. Ja. 129.  
Wood v.  
Smith.

It was in one case doubted whether, as only damages can be recovered in an action of trespass, it be necessary to shew in the declaration the value of the thing, for the taking or injuring of which the action is brought.

Sid. 39.  
Usher v.  
Bushell.  
Hil. 12 Car. 2.

But it is in two subsequent cases laid down, that it is necessary to shew this in the declaration in this action.

Cro. Ja. 129.  
Wood v.  
Smith.

It was doubted in one case, whether the want of having shewn in the declaration in an action of trespass the value of the thing, for the taking or injuring of which it is brought, be after a verdict cured by the statute of the 18 Eliz. c. 4.

But

But it was holden in a subsequent case, that the omission of having shewn this in the declaration is, after a verdict, cured by that statute. Sid. 39. Usher v. Bushel.

It is in the general true, that it must be alleged in the declaration in an action of trespass, that the injury was to the damage of the plaintiff.

But, if churchwardens bring an action of trespass for taking or injuring goods belonging to their parish, they have an election to allege, that the injury was to the damage of themselves, or that it was to the damage of the parishioners. Cro. Eliz. 197. Hammond v. Green.

The plaintiff in an action of trespass declared for breaking his close, and beating his servant. A general verdict being found, and entire damages assessed, it was upon a motion in arrest of judgment insisted, that the declaration is bad; because the plaintiff has not shewn any special damage received from the beating of the servant: but judgment was given for the plaintiff. And by the court—Although the plaintiff cannot recover for the personal injury done to the servant, yet the alleging of this, which may be well done in aggravation of damages, shall not prevent him from recovering for the breaking of his close. Salk. 643. Newman v. Smith.

But in another case it is laid down, that, unless the damages are in such case assessed for the breaking of the close only, the declaration is bad even after a verdict; because it shall be intended, that the jury assessed damages for the beating of the servant. 10 Rep. 130. Osborne's case.

And in the latter case, the case of *Pole v. Gardiner*, in which the same had been laid down, as is laid down in the case of *Newman v. Smith*, is expressly denied to be law. *Ibid.*

Wherever a defect of allegation in the declaration in an action of trespass is supplied by the plea, the defect is thereby cured.

The plaintiff in an action of trespass declared for taking a hook, but he did not allege it to be his hook, or that it was in his possession. The defendant in one plea justified the taking of the hook out of the plaintiff's hand. Upon a motion in arrest of judgment it was holden, that the defect of allegation in the declaration would have been fatal, if the defendant had only pleaded not guilty; but that, as it appears from one plea, that the defendant took the hook out of the plaintiff's possession, the defect is not fatal. Sid. 184. Glascock v. Morgan.

The declaration in an action of trespass charged the taking of *quatuor pullos*, but it did not say *pullos equinos*, or add an *Anglicè*, colts. It was holden, that the want of certainty in this declaration was made good by one of the defendant's pleas, wherein he justified the taking of four colts. Lutw. 1492.

## 2. Of declaring with a Continuando.

If a trespass be continued without intermission for a longer time than the space of one day, or if the trespass be repeated on a subsequent day, the party injured may recover in one action of trespass for the first trespass, and in another for the continuance or repetition thereof. Dyer 320. Moor v. Brown.

But

2 Roll. Abr. 545. A. pl. 1. But the party injured is not under a necessity of bringing two actions in either case : for he may in one action, by declaring with a *continuando*, recover a satisfaction for the first trespass, and also for the continuance or repetition thereof.

There are two ways of declaring in an action of trespass with a *continuando*.

Co. Entr. 661. In one of these the plaintiff declares with a *continuando* for the whole time, from the day on which the first trespass is charged until a subsequent day mentioned in the declaration.

Fitz. N. B. 91. Co. Entr. 661. Bro. Tresp. pl. 374. This way of declaring is proper, in any case wherein the trespass may have been continued without intermission, for a longer time than the space of one day.

Co. Ent. 643. 658. In the other, the plaintiff declares with a *continuando* on divers days and at divers times, from the day on which the first trespass is charged until a subsequent day mentioned in the declaration.

Ld. Raym. 240. Fontleroy v. Aylmer. Ibid. 824. 976. Bro. Tresp. pl. 149. Sir Thomas Raym. 396. This way of declaring is proper, in any case wherein there may have been a repetition of the trespass upon a day subsequent to the day on which the first trespass is charged, or where part of the trespass may have been committed upon one day and part upon another.

Salk. 638, 639. Monkton v. Pashley. If the nature of a trespass be such, that it cannot have been continued or repeated, the plaintiff in an action of trespass cannot declare with a *continuando*.

Bro. Tresp. pl. 441. 1 Lev. 210. If this action be brought for taking a horse, the plaintiff cannot declare with a *continuando*; because there cannot have been either a continuance or a repetition of the trespass.

Bro. Tresp. pl. 441. 2 Roll. Abr. 549. l. pl. 5. It is laid down, that the plaintiff in an action of trespass cannot declare with a *continuando* for cutting down ten trees; because the trespass cannot have been continued or repeated.

Bro. Tresp. pl. 374. pl. 441. It is laid down in one book, that the plaintiff in an action of trespass cannot declare with a *continuando* for breaking his house; because the whole of the trespass must have been committed at the same time.

Fitz. N. B. 91. But it is in another book laid down, that the plaintiff in this action may declare with a *continuando* for breaking his house.

Ld. Raym. 975. Monkton v. Pashley. Salk. 638. S. C. [See upon this point, Bull. N. P. 86.] For the sake of reconciling these two books, this distinction was taken in one case; namely, That where the first breaking of the house was followed with an ouster, the party injured may declare in an action of trespass with a *continuando*; because by the ouster the trespass is continued: but that where the first breaking was not followed with an ouster, the party injured cannot declare in this action with a *continuando*; because every subsequent breaking of the house is a new trespass, and not a continuance or repetition of a former trespass. And in support of this distinction it was said, that a release of a trespass, which was followed with an ouster, is a release of all trespasses on the premises during the continuance of

of the ouster : but that a release of a trespass, which was not followed with an ouster, is not a release of a trespass on the premises subsequent to the ouster. But the court was not satisfied with the distinction ; and it was said by *Porvel, J.* that a *continuando* in pleading does not always mean a continuance without intermission.

It is in another case said, that what is laid down in *Brooke and Fitzherbert* may be reconciled, by supposing, that by the breaking of the house in the cases in *Brooke* a total breaking or throwing down thereof is to be intended ; for which, as the trespass cannot have been continued or repeated, a declaration with a *continuando* would be bad : but that by the breaking of the house in the case in *Fitzherbert*, a partial and repeated breaking thereof is to be intended, for which a declaration with a *continuando* would be good.

It is laid down in two books, that although the declaration in an action of trespass for the taking of two loads of wheat and five loads of barley, with a *continuando* for the whole time, from the day on which the first trespass is charged until a subsequent day mentioned in the declaration, be not good, a declaration with a *continuando* on divers days and at divers times, from the day on which the first trespass is charged till a subsequent day mentioned in the declaration, is good.

It is in another book laid down, that a declaration for the breaking of a house, with a *continuando* on divers days and at divers times, from the day on which the first trespass is charged till a subsequent day mentioned in the declaration, is good ; because part of the house may have been broken upon one day, and part upon a subsequent day.

In another book it is said, that in action of trespass for cutting down several acres of wood, a declaration with a *continuando* is good.

The declaration in an action of trespass charged the taking of ten loads of wheat, ten loads of barley, and ten loads of oats, on the first day of *April*, with a *continuando* on divers days and at divers times, from the said first day of *April* until the first day of *June*. Upon a writ of error in this case it was assigned for error, that the declaration ought not to have been with a *continuando* ; because, it being alleged that all the corn was taken on the first day of *April*, none of it could have been taken on a subsequent day. The judgment was affirmed. And by the court—Where from the nature of the trespass, as if it be the taking up of a horse, the whole of it must have been committed at once, a declaration with a *continuando* would be ill : but, where from the nature of the trespass, part of it may have been committed upon one day, and part upon another, it shall be intended, in support of a declaration which charges the trespass with a *continuando*, notwithstanding it be alleged that the whole trespass was committed upon the day first mentioned in the declaration, that part thereof was committed upon another day.

Ld. Raym.  
240.  
Fontleroy v.  
Aylmer.

Bro. Tresp.  
pl. 149.  
2 Roll. Abr.  
549. I. pl. 6.  
pl. 7.

Ld. Raym.  
240.  
Fontleroy  
v. Aylmer.

Sid. 319.

1 Lev. 210.  
Butler v.  
Hedges,  
Pasch.  
19 Car. 2.

Ld. Raym.  
239.

It is indeed said to have been holden in the case of *Ovel v. Langden*, which was subsequent to the case of *Butler v. Hedges*, that in an action of trespass for taking oysters, the declaration with a *continuando* upon divers days and at divers times was bad; for that every taking upon any day subsequent to the day first mentioned in the declaration was a new trespass, and not a continuance of the first trespass.

2 Jon. 109.  
Hovel v.  
Reynolds.  
1 Vent. 327.  
2 Show. 196.

But the book from which this case is cited, the name of which appears to be *Hovel v. Reynolds*, is quite silent as to this point. Another book, in which this case is reported, is also quite silent as to this point. And in another report of the same case it is said, that the declaration was as to this point holden to be good.

2 Roll. Rep.  
135.  
Sliford v.  
Goodrick.  
5 Rep. 35.

The plaintiff in an action of trespass declared for the breaking of his close, with a *continuando* for the whole time, from the day on which the first trespass was charged until the day of exhibiting the bill; but it was not shewn on what day the bill was exhibited. *Doddridge, J.* was of opinion, that the declaration was bad, even after a verdict, for want of shewing this; and it was said, that the constant practice is, to allege the continuance of the trespass to a day certain.

Jenk. Cent.  
124. pl. 52.

If in the declaration in an action of trespass, the trespass be laid with a *continuando* on divers days and at divers times, the particular days on which the trespass was repeated need not be shewn.

1 Lev. 210.  
Butler v.  
Hedges.  
Salk. 639.

If in an action of trespass the declaration charge a trespass, of which there cannot have been continuance, with a *continuando*, the declaration is bad.

3 Lev. 94.  
Gillam v.  
Clayton.  
Salk. 639.  
Sid. 375.  
2 Show. 196.

If in the declaration in an action of trespass two trespasses are laid with a *continuando*, whereas only one of them could have been continued, the declaration, although entire damages have been assessed, is good after a verdict; for it shall be intended, that the damages, which are assessed for the continuance, are assessed for the continuance of that trespass which might have been continued.

### 3. Of the Plea.

#### 1. Of pleading in Abatement.

Bro. Tresp.  
pl. 190.  
9 Ed. 4. 51.

In an action of trespass brought by baron and feme for the battery of both of them, damages to the amount of ten pounds were assessed for the battery of the baron, and damages to the amount of forty shillings for the battery of the feme. It was holden, that as the wife could not join with her husband in an action for the battery of him, the writ abated as to that part; but that it was good as to the battery of the wife, for which the husband and wife had a joint right of action.

Bro. Tresp.  
pl. 190.

It is laid down that if *J. S.*, who has no right of action, have joined in a writ of trespass with *J. N.*, in whom there is a right of action, the writ *ipso facto* abates.

*Hare*

*Hare* and three others having joined in a writ of trespafs *quare clausum fregit*, it was found specially by the jury, that only *Hare* had an interest in the land to which the injury was done. It was holden, that the writ *ipso facto* abated. Cro. Eliz. 143. *Hare and others v. Celey*.

But in another case, a few years subsequent to the case of *Hare and others v. Celey*, it was holden, that the writ is in such case only abateable. In an action of trespafs the jury found that two others were tenants in common with the plaintiff. It was holden, that the plaintiff was entitled to judgment. And by the court—As the defendant has omitted to plead in abatement, that the plaintiff is tenant in common with two others who are not named in the writ, he cannot now avail himself of the finding of the jury. Cro. Eliz. 554. *Deering v. Moor*.

It is not a good plea in abatement of an action of trespafs, that *A.*, the place in which the *venue* is laid, is a hamlet belonging to the parish of *B.*, for the *venue* may be laid in a hamlet. Bro. Tresp. pl. 15. pl. 239. pl. 371.

It is in one case laid down, that if the *venue* in an action of trespafs be laid in *A.* in the county of *B.* without any addition, and there be two vills of the name of *A.* in the county, one of which is called *A. over*, and the other *A. nether*; and there be no vill in the county of the name of *A.* without addition, this cannot be pleaded in abatement. Bro. Tresp. pl. 14.

But in two other cases in the same book it is laid down, that it may in this case be pleaded in abatement of the action, that there are two vills of the name of *A.* in the county of *B.*, one of which is called *A. over*, the other *A. nether*; and that there is no vill in the county of the name of *A.* without addition; *absque hoc*, that there is any vill, hamlet, or known place out of a vill or hamlet, called *A. only*, in the county of *B.* Bro. Tresp. pl. 94. pl. 299.

And the latter seems to be the better opinion; for in another case in the same book it is laid down, that no such vill in the county as that in which the *venue* is laid, is a good plea in abatement of an action. Bro. Tresp. pl. 19.

The pendency of a former action cannot be pleaded in abatement of a second action of trespafs, until the plaintiff has declared in both actions; because, as the writ of trespafs is general, it cannot be known, until the cause of action is ascertained in both actions by the declarations, that the second action is brought for the same cause as the first. 5 Rep. 61. *Sparric's case*.

And for the same reason, the defendant cannot plead in abatement of an action of trespafs for taking goods, that there is an action of replevin depending for the taking of the same goods until the plaintiff has declared in both actions. *Ibid.*

## 2. Of pleading in Chief.

### 1. The General Issue.

The general issue is a proper plea for the defendant in an action of trespafs, in case the plaintiff had no property in the personal chattel, for the taking or injuring of which the action is brought; Bro. Tresp. pl. 34. pl. 382.

brought; because, unless it be proved, that the plaintiff had either a general or special property in the chattel, he is not entitled to recover.

Bro. Tresp.  
pl. 273.  
pl. 361.  
Dyer 285.

But it is not always proper for the defendant in an action of trespass for breaking the plaintiff's close to plead the general issue, although the freehold of the close were in the defendant. For in some cases the person, who is in the possession of a close, may recover in this action against the person in whom the freehold is.

## 2. A Special Plea.

The defendant in an action of trespass cannot plead any matter specially, which amounts to the general issue.

Bro. Trav.  
pl. 14.  
Bro. Tresp.  
pl. 19.  
Bro. Attaint.  
pl. 104.

In the declaration in an action of trespass it was alleged, that the trespass was committed at *A.* in the county of *B.* The defendant justified the act complained of at *C.* in the county of *D.*, and traversed the having done it at *A.* in the county of *B.* It was ordered that the general issue should be entered; because the plea amounted thereto. And by the court—The defendant ought to have pleaded the general issue; for the jury cannot, as the trespass charged is local, find him guilty, unless it be proved that he committed it at *A.* in the county of *B.*

Bro. Tresp.  
pl. 34.

The defendant in an action of trespass pleaded, that the personal chattel, for the taking of which it was brought, was not the property of the plaintiff. The general issue was ordered to be entered; because this plea amounted thereto.

Bro. Tresp.  
pl. 27.

But it has been holden, that the gift of a personal chattel may be pleaded in an action of trespass for the taking thereof: for that this, although it be a denial of the plaintiff's property, does not amount to the general issue.

Bro. Trav.  
pl. 378.

If an action of trespass be brought by *J. S.* for the beating of *J. N.* his servant, by reason whereof he lost the service of *J. N.*, the defendant cannot plead that *J. S.* did not lose the service of *J. N.*; because, as *J. S.* cannot recover unless the loss of service be proved, this plea amounts to the general issue.

Bro. Tresp.  
pl. 34.  
pl. 326.

But the defendant in such action may plead, that *J. N.* was not the servant of *J. S.* at the time of the beating; for this plea does not amount to the general issue.

3 Lev. 41.  
Thomas v.  
Nichols.

If one matter, which amounts to the general issue, be joined in the same plea with another matter which amounts only to a justification, the plea is good.

The books are not agreed, as to what is proper to be done by the plaintiff, where the matter specially pleaded by the defendant in an action of trespass amounts to the general issue.

Hob. 127.  
1 Leon. 178.  
Cro. Ja. 165.

In some of them it is laid down, that the plaintiff cannot in this case demur; but that he ought to move the court, that the general issue, or a *nil dicit*, may be entered.

10 Rep. 95.  
Cro. Eliz.  
146. 319.  
Cro. Ja. 319.

In others it is laid down, that a special plea, where the matter specially pleaded amounts to the general issue, would, it being defective in form, before the statute made in the twenty-seventh year



year of the reign of Queen *Elizabeth*, have been bad upon a general demurrer, and that it is so at this day upon a special demurrer.

Cro. Car.  
157.  
1 Sid. 106.

As it has been already shewn, in treating of the injuries for which an action of trespass lies, in what cases this action does not lie for an act which is in the general a trespass, on the account of some particular circumstance attending the act; it is in this place sufficient to say, if any circumstance make an act, which is in the general a trespass, lawful or excusable, this may be pleaded specially in an action of trespass.

If the circumstance, which is specially pleaded in an action of trespass, make the act complained of lawful, it is proper to plead this circumstance in justification; and it is not in this case necessary for the defendant to shew that the act complained of was not done voluntarily: for a plea in justification is not founded upon a supposition that the act was accidental.

Hob. 134.  
Weaver v.  
Ward.

If the circumstance, which is specially pleaded in an action of trespass, do not make the act complained of lawful, and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to shew not only that the act complained of was accidental, but likewise that it was not owing to neglect, or want of due caution.

*Ibid.*

If, at the instant a soldier discharges his gun in exercising, a person runs across and is wounded, the defendant cannot plead in justification of the wounding: and if he plead in excuse thereof, all the circumstances must be shewn, that the court may judge, whether the wounding were owing to want of due caution.

*Ibid.*

If the defendant in an action of trespass plead several matters in justification, any one of which is a good justification, the plea is good, although the others are not so.

Jenk. Cent.  
184. pl. 77.

If two defendants in an action of trespass join in a plea of justification, which is a good justification of only one of them, the plea is bad as to both; for a joint plea cannot be good as to one defendant and bad as to the other.

Str. 509.  
Phillips v.  
Biron.  
1 Saund. 28.  
[Smith v.  
Bouchier,

2 Str. 993. Ca. temp. Hardw. 62. S. C. Middleton v. Price, 2 Str. 1184. 1 Wilf. 17. S. C. Parsons v. Lloyd, 2 Bl. Rep. 345. Perkins v. Proctor, 2 Wilf. 382. all S. P. Cole v. Hindson, 6 Term Rep. 234.]

Every special plea in an action of trespass must confess, that the act complained of has been done.

Salk. 638.  
Gibbon v.  
Papper. 1 Saund. 28.

It is in the general true, that if the plea in an action of trespass, which is brought for taking goods, justify the taking of the goods, it must confess that the property was in the plaintiff.

Salk. 640.  
Juce v. Mill-

But, if the defendant in such action plead in justification, that he took the goods as a distress for rent in arrear, it is not necessary to confess that the property in them was in the plaintiff; for the goods of any person, if found upon the premises, may be distrained for rent in arrear.

*Ibid.*

It is laid down, that it is not necessary for a sheriff's officer, who justifies in an action of trespass under the warrant of the sheriff,

Bro. Faux  
Impr. pl 126

sheriff, to shew in what place the warrant was issued; for that this, if it be made necessary by the replication, may be shewn in the rejoinder.

1 Roll. Rep.  
135. Wilfon  
v. Dodd.

But it is said, that an officer, who justifies in an action of trespass under the warrant of a justice of the peace, must shew at what place the warrant was issued.

Carth. 443.  
Britton v.  
Cole.  
Str. 509.

If the person, at whose suit a writ of *fieri facias* has issued, justify in an action of trespass under the writ, he must shew the judgment upon which it issued; because, if the judgment were not regular, he is liable to the action.

Carth. 443.  
Britton v.  
Cole.

Every person who has assisted in the execution of a writ of *fieri facias* must, if he justify in an action of trespass under the writ, unless he acted by the command or at the request of the sheriff or his officer, shew the judgment upon which it is issued: for, if he acted officiously, it was incumbent upon him to take care that the judgment was regular. But, if a sheriff or his officer, or a person acting by the command or at the request of the sheriff or his officer, justify in this action under a writ of *fieri facias*, it is not necessary for either of these to shew the judgment upon which the writ issued; because the writ was a sufficient justification to every one of these, although the judgment were not regular.

Cole v.  
Hyndford,  
6 Term Rep.  
234.

[If, in trespass for taking the goods of *A. B.*, an officer justify, that he took them under a *distingas* against *C. B.* (meaning the said *A. B.*) to compel an appearance, averring that *A. B.* and *C. B.* are the same person, the plea is bad; for it does not state that *A. B.* appeared in the action, and omitted to plead the misnomer in abatement.]

Sayer, 82.  
Adams v.  
Freeman and  
Wynne.

It is not necessary for the defendant in an action of trespass, who justifies an imprisonment under a *capias* of an inferior court, to set out all the proceedings in that court; or to shew that the cause of action in the inferior court arose within the jurisdiction of that court.

Adams v.  
Freeman,  
2 Will. 5.

[So, if a defendant justify under a *capias* out of a base court, in an action of debt, and shew, that the plaint was levied, *et taliter processum fuit*, that the *capias* issued; it is sufficient, without shewing that a summons issued before the *capias*.]

Str. 509.  
Phillips v.  
Biron.  
1 Saund. 28.

If one person, who might have justified in an action of trespass under a writ, have joined in a plea of justification with another to whom the writ was not a justification, the plea is bad as to both; for a joint plea cannot be good as to one defendant, and bad as to the other.

3 Lev. 323.  
Darby v  
Hodgson.

If the defendant in an action of trespass justify under a prescription to dig stones for certain repairs, he must shew that the stones dug were used for such repairs.

Feppin v.  
Shakespeare,  
6 Term Rep.  
748.

[If *J. S.* justify under a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, he must allege, that the house was out of repair, that he entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose.]

3 Lev. 92.  
Sprigg v.  
Neal.

If *J. S.* justify in an action of trespass the breaking down of a gate erected in the yard of *J. N.*, through which he had a right of

of passage, he must shew that the gate was locked, or otherwise fastened, so as to make the breaking necessary.

The declaration in an action of trespass charged the chasing of a beast *ita quod* it died of the chasing. The defendant justified the chasing; but gave no answer as to the dying of the beast. This plea was holden to be bad.

In two subsequent cases a contrary doctrine is laid down. In one of these this case is denied to be law; and it is in both of them laid down generally, that it is not necessary for a defendant to give any answer to what is alleged under an *ita quod* or a *per quod*; because this is only alleged in aggravation of damages.

Cro. Eliz. 384. Hill v. Prideaux. Pasch. 37 Eliz. 1 Lev. 283. Leech v. Midgley, Hil. 21 Car. 1. Salk. 459. Lodie v. Arnold, Mich 9 W. 3.

[In trespass for taking cattle, and keeping them so closely in pound, that one of them died, the defendant pleaded first the general issue to the whole; and then justified the taking and impounding them damage-feasant; the plaintiff replied *de injuriâ propriâ*, and thereupon issue was joined. The jury found for the plaintiff on the first issue, and for the defendant on the justification. But it was ruled, that judgment should be entered up for the defendant; for the justification was an answer to the whole trespass, *viz.* the taking and impounding; the dying of the beast being merely matter of aggravation: and if the plaintiff would have insisted upon the abuse of the distress, he ought to have stated it in his replication.

In trespass for taking and carrying away the plaintiff's halter and converting the same to the defendant's use, the defendant pleaded the general issue, and justified under a prescriptive right to distrain for toll, which was found for him; but on the general issue the plaintiff had a verdict. A motion was made to enter up judgment for the plaintiff, notwithstanding the defendant had proved his justification, because it did not cover the whole trespass, namely, the conversion. But the court held, that as the defendant's plea had fully answered the gist of the action, which was the taking, the conversion being only aggravation, it became necessary for the plaintiff to reply, that the defendant afterwards converted, &c., and thereby became a trespasser *ab initio*.

So, in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the defendant need only justify the breaking and entering; if the plaintiff would take advantage of the expulsion, he must new assign it.]

If an award be pleaded in an action of trespass, with a *protestando* that the defendant is ready to perform it, this is a good plea; for, as an action of debt will lie upon the award, it is not necessary to shew that it has been performed.

But, if an accord with satisfaction be pleaded in this action, the defendant must shew, that the satisfaction has been made; this being the material part of his defence.

It is not sufficient for the defendant in an action of trespass, who has pleaded an accord with satisfaction, to shew that the money, which by the accord was to have been paid, has been tendered

Gates v. Bayley, 2 Will. 313.

Fisherwood v. Concanen, Hil. 5 G. 3. C. B. cited in 3 Term Rep. 297. Dye v. Leatherdale, 3 Will. 22. S. P.

Taylor v. Cole, 3 Term Rep. 292.

Bro. Tresp. pl. 69. Bro. Accord, pl. 3. pl. 6.

Bro. Accord, pl. 6.

9 Rep. 79. Peyton's case. Bro. Accord pl. 6. pl. 2.

dered to the plaintiff; because, unless the money has been in fact paid, the plaintiff cannot be said to be satisfied.

Dyer, 326.  
Fitz. Accord, pl. 3.  
pl. 4.

It is no plea in an action of trespass, that it was agreed between the plaintiff and the defendant, that the goods which the latter had taken from the former should be restored, and that they were restored; for by the restoration of the goods no satisfaction was made for the tort in taking them.

Bro. Accord, pl. 1.  
Fitz. Accord, pl. 3.  
pl. 4.  
Dyer, 356.

It must appear, that the satisfaction, which is pleaded in an action of trespass, was not only beneficial to the plaintiff, but that the making thereof was attended with some expence to the defendant.

Fitz. Accord, pl. 1.

It is not a good plea in an action of trespass, that it was agreed between the plaintiff and the defendant, that the latter should, as a satisfaction for the trespass, make up a difference between the plaintiff and *J. S.*, and that the defendant did make it up; unless it be shewn, that the making of this up was attended with some expence to the defendant.

2 Roll. Abr.  
569. R. pl. 1.

A satisfaction, although there have been no accord, may be pleaded in an action of trespass: but it must be shewn, that the plaintiff accepted of the satisfaction.

Bro. Accord, pl. 3.

It is a good plea in this action, that the defendant gave the plaintiff a bottle of wine as a satisfaction, and that the plaintiff accepted thereof as a satisfaction, although there have been no accord.

Bro. Bar.  
pl. 22.  
9 Rep. 80.

A satisfaction, although it were made in consequence of an accord, may be pleaded in an action of trespass without pleading the accord; for the satisfaction is the material thing.

Bro. Trav.  
pl. 179.

And it is a much safer way, although there have been an accord, to plead the satisfaction without the accord; for if the accord be pleaded, this, although it were not necessary to have been pleaded, becomes material; and, consequently, the plaintiff has an election to traverse either the accord or the satisfaction.

Bro. Bar.  
pl. 22.  
9 Rep. 80.

The pleading of an accord moreover lays the defendant under a difficulty: for if this be pleaded, every circumstance which attended the making thereof must be shewn with great precision.

Shep. Abr.  
1043.

If three have been parties to a trespass, and one of them have made a satisfaction, the other two may plead this in bar of an action for the trespass.

2 Roll. Abr.  
569. R. pl. 1.

If a man be amerced in the lord's court for a trespass done to the lord, and the money amerced be paid or levied, and received by the lord, the payment or levying of the money and the receipt thereof may, although the amercement were illegal, be pleaded in satisfaction, in case an action of trespass be brought.

Cro. Eliz.  
245. Taylor  
v. Fisher,  
Bro. Tresp. pl. 295.

If a licence be pleaded in an action of trespass, it must be shewn, that this was granted by a person having power to grant it.

Sty. 72.  
Gilbert v.  
Stone.

An action of trespass being brought for taking a gelding, the defendant pleaded, that for fear of his life, which twelve armed men

men threatened to take away if he did not do it, he took the gelding. This was holden to be a bad plea. And by *Roll, Ch. J.*— If a defendant could in this manner excuse himself, the injured party would be without redress; for the men, who threatened the defendant, are not liable to make a satisfaction to the plaintiff.

It was heretofore holden, that, never accoupled in lawful marriage, was not a good plea, in an action of trespass for taking away a wife with the goods of her husband; because this action lies, although there has been only a marriage *de facto*.

2 Roll. Abr.  
551. pl. 1.  
But *quare*,  
Whether  
this plea  
would not  
be good since the marriage-act?

If a release have been given to one party to a trespass, any other party thereto may plead this in bar of an action of trespass: but it must be pleaded with a *profert in curia*; and there must be an averment, that the trespass complained of is the same that was released.

Hob. 66.  
Cock v.  
Jenour.

A conviction upon a statute for an offence may be pleaded in an action of trespass for the offence.

Salk. 131.

In every action of trespass *quare clausum fregit*, the defendant may plead, that the place in which the trespass is charged is his freehold.

Salk. 453.  
Helvis v.  
Lamb.

But, if an action of trespass be brought for taking a tree out of a close, the defendant cannot plead, that the place in which the trespass is charged is his freehold; for this can only be pleaded to an action of trespass *quare clausum fregit*.

Carth. 176.  
Ailstone v.  
Hutchinson.

If to an action of trespass brought for breaking a close and eating grass with cattle, the defendant plead, that the cattle escaped out of an adjoining close in his possession, through a fence in the possession of the plaintiff, which the plaintiff ought to have kept in repair, and which was out of repair; it is necessary for the defendant to shew why the plaintiff was bound to have kept the fence in repairs.

Yelv. 75.  
Faldo v.  
Ridge.

If *J. S.* have recovered land in an action of ejectment against *J. N.*, and afterwards *J. N.* bring an action of trespass against *J. S.* for an injury done to the land, *J. S.* may plead the recovery in the action of ejectment; because the possession of *J. N.* was divested by the recovery in the action of ejectment.

3 Leon. 194.  
Anon.

If a recovery in a former action be pleaded to a second action for the same trespass, it is not necessary to shew, that a writ of execution was issued upon the judgment in the first action.

Bro. Tresp.  
Pl. 20.

If an action of trespass be brought for taking a horse, and the defendant justify the taking of it damage-feasant in his close called *A.*, it is sufficient to allege a possession of the close in himself: for, as the right of close cannot come in question, it is not necessary to shew by what title he is possessed.

Cro. Car.  
138.  
Salk. 643.  
12 Mod. 37.

But, if the declaration, in an action of trespass *quare clausum fregit*, charge the breaking of a close called *A.*, the defendant, if he justify the breaking, must shew a title to the close; because, as a close certain is mentioned in the declaration, the question depends upon the right of close.

Salk. 643.  
12 Mod. 507.

2 Saund. 401.  
Pearl v.  
Bridges.  
1 Vent.  
221.

If the defendant in an action of trespass justify the taking of corn out of a close in the possession of the plaintiff, he must shew a right to the corn; for it shall *primâ facie* be intended, that it was the corn of the plaintiff.

Bro. Tresp.  
pl. 360.  
pl. 366.

If the plaintiff in an action of trespass *quare clausum fregit* have not given a name to his close, the defendant may justify the act complained of in his close called *A.*, in the vill where the *venue* is laid, and there is no necessity to traverse the having done it in any other close in that vill.

Bro. Tresp.  
pl. 360.  
pl. 366.  
pl. 369.

But, if the plaintiff in this action have given a name to his close, the defendant cannot justify the act complained of in any other close in the vill wherein the *venue* is laid, without traversing the having done it in the close of the plaintiff: but it is not necessary to traverse the having done it in any other vill; because, as the trespass is local, he cannot be found guilty in any other vill.

Bro. Tresp.  
pl. 219.  
3 Lev. 219.

If an action of trespass be brought for a transitory trespass, and the *venue* be laid at *A.* in the county of *B.*, it is not necessary for the defendant, provided he justify the act complained of at *A.* in the county of *B.*, to traverse the having done it at any other place; the place being agreed.

Riley v.  
Parkhurst,  
Tr. 22 G. 2.  
Bull. N. P.  
90.

[In trespass for taking and detaining the plaintiff's cattle at *Teddington*, the defendant justified taking them *damage-feasant* at *Kingston*, and that he drove them to *Teddington*, and impounded them there. It was objected on demurrer, that the justification was local, and therefore the defendant ought to have traversed the place in the declaration. *Sed non allocatur*;—for when the defendant says, he drove them to *Teddington*, and impounded them there, they agree in the place; for if the defendant had not a right to take them, he was a trespasser at *Teddington*.]

1 Inst. 282.  
Cro. Ja.  
372.  
3 Lev. 113.  
2 Saund. 5.

The defendant in an action of trespass, in case the matter of justification be transitory, must always justify at the place in which the *venue* is laid, although the matter of justification arise at another place: nor is there any inconveniency in so doing; for, as the matter of justification is transitory, he may avail himself thereof, notwithstanding it arise at another place.

1 Inst. 282.  
Cro. Eliz.  
705. Cro.  
Jac. 372.  
3 Lev. 113.

But, if the *venue* in an action of trespass be laid at *A.* in the county of *C.*, and the matter of justification be, that the defendant did the act complained of at *B.* in the county of *C.*, as constable thereof, he can only justify at *B.* in the county of *C.*, because the matter of justification is local; and he must traverse the having done the act at any other place.

1 Inst. 282.  
Bro. Trav.  
pl. 76.  
pl. 85.  
pl. 102.  
Cro. Jac.  
372.

So, if the *venue* in this action be laid at *A.* in the county of *B.*, and the matter of justification be, that the act complained of was done by the defendant in the county of *C.*, as a justice of the peace of this county, the defendant, as the matter of justification is local, can only justify at some place in the county of *C.*, and he must traverse the having done the act at *A.* in the county of *B.*, or at any other place out of the county of *C.*

The defendant, who justifies in an action of trespafs, ought, unless there be some special reason to the contrary, to justify upon the day on which the act complained of is alleged to have been done.

And if the defendant in this action justify the act complained of upon the day on which it is alleged to have been done, it is not necessary to traverse the time either before or after; the day being agreed.

2 Saund. 5.  
Mellor v.  
Walker.

Bro. Tresp.  
pl. 219.  
Cro. Car.  
228.

2 Saund. 295. 1 Bulst. 138. 1 Freem. 246.

But, if the defendant in this action justify the act complained of upon any other day than that on which it is alleged to have been done, it is necessary to traverse the time before, or the time after, or both, as the case may require.

Bro. Tresp.  
pl. 219.  
Cro. Car.  
228.

1 Bulst. 138. Lutw. 452.

If the justification be, that the defendant had a licence to do the act complained of, the time antecedent as well as that subsequent to the time of the licence must be traversed.

Sid. 294.  
2 Saund.  
295.

But, if the justification be under a release, it is sufficient to traverse the time subsequent to the release; for by the release all trespasses antecedent thereto are discharged.

Hob. 104.  
Cro. Eliz.  
87.

If the defendant justify under a feoffment, it is only necessary to traverse the time antecedent to the feoffment; for it shall be intended, unless the contrary be shewn, that the freehold continued in him.

Hob. 104.  
Cart. 207.

It is laid down in one case, that the want of traversing the time, either before or after the day upon which the act complained of is justified, is not cured by an averment that it is the same trespass.

1 Ventr.  
184.  
Smith v.  
Butterfield.

Hil. 23 Car. 2. 2 Keb. 878. S. C.

But in divers other cases, some of which are subsequent to the case of *Smith v. Butterfield*, it is laid down, that the want of doing this is cured by an averment that it is the same trespass.

1 Bulstr.  
138.  
Cro. Car.  
228.

2 Jon. 146. 3 Lev. 277. Lutw. 1457.

And it is in one of the subsequent cases laid down, that if the defendant in an action of trespafs, who justifies the act complained of, after averring that it is the same trespass, add a traverse of the time, either before or after the day justified upon, the plea is bad upon a special demurrer.

Lutw. 1457.  
Hargrave  
v. Ward.  
Hil. 9 W. 3.

### 3. *Both the General Issue and a Special Plea.*

The manner of pleading a single plea in an action of trespafs, where the defendant intends to justify the whole act complained of, except the force and arms, is to plead not guilty as to the force and arms, and to justify as to the residue.

Co. Entr.  
644. 647.  
Rail. Ent.  
605, 606.

It has indeed been holden in one case, that, if the defendant in an action of trespafs justify all the residue of the trespafs charged, it is not necessary to give an answer as to the force and arms.

1 Saund. 81.  
Law v.  
King.

The determination in this case was probably founded upon a supposition, that the words *vi et armis* are words of form.

Ante.

But the better opinion is, as has been already observed, that these words are words of substance. And if they are words of substance, it seems necessary to give an answer as to them.

Rast. Entr.  
612.

If two defendants in an action of trespass have different matters of justification as to the whole act complained of, it is proper for both to join in pleading not guilty as to the force and arms; and then for each to plead separately his matter of justification.

Co. Entr.

651.

Rast. Entr.  
606.

If two independent acts are complained of in an action of trespass, the defendant may justify as to one act, and plead not guilty as to the force and arms and the other.

Cro. Ja.

439.

Evelly v.

Sloley.

Ld. Raym.

231, 232.

But, if the complaint be of battery and false imprisonment, it has been holden, that these are not two such independent acts, as to admit of the defendant's pleading not guilty as to the force and arms and the battery, and a justification as to the imprisonment; because in every false imprisonment there is an implied battery.

Ld. Raym.

231.

Truscot v.

Carpenter.

If, however, it in such case appear from the declaration, that the battery is an independent act, the defendant may plead not guilty as to this and the force and arms, and justify as to the imprisonment.

3 Lev. 404.

Parrick v.  
Johnson.

If the complaint in an action of trespass consist of four entirely independent acts, the defendant may plead not guilty as to the force and arms and one of the acts, and justify generally as to the other three acts by the words as to the residue of the trespass, without enumerating them.

Ld. Raym.

231.

Truscot v.

Carpenter.

3 Lev. 404.

Co. Entr.

651.

And this is the safer way of pleading; for if the defendant, instead of relying upon the words as to the residue of the trespass, endeavour to enumerate the other three acts, and omit one of them, or any circumstance attending it, the plea is bad.

If the complaint in an action of trespass, to which two are defendants, consist of several independent acts, one defendant may plead not guilty as to the force and arms, and all the residue of the trespass, except the act as to which he justifies; and the other may plead not guilty as to the force and arms and all the residue of the trespass, except the act as to which he justifies.

Bro. Ear.

Pl. 51.

The defendant in an action of trespass could not heretofore plead two pleas, each of which went to the whole of the trespass alleged.

By the 4 Ann. c. 16. it is enacted, "That it shall be lawful for any defendant in any action in any court of record, with leave of the court, to plead as many several matters as he shall think necessary for his defence."

#### 4. Of giving Colour.

Colour is a feigned matter pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or colour of cause.

10 Rep. 91.

Layfield's

case.

Don. Pl. 77.

The shewing of such matter by the defendant is called giving colour. As the design of giving colour is to draw the determination of some matter from the jury to the court, it is necessary, that



the colour given should consist of a matter, which is not proper for the determination of a jury.

10 Rep. 39,  
90. Ley-  
field's case.

If the defendant in an action of trespass *quare clausum fregit* plead, that the plaintiff claims the close, in which the act complained of is charged to have been done, under colour of a deed of feoffment by which nothing passed, this is good colour; because nothing passes by a deed of feoffment unless possession be delivered, and the jury are not proper judges of what amounts to delivery of possession.

Cro. Jac.  
122.  
10 Rep. 39,  
90.

But, if the defendant in an action of trespass for taking goods plead, that the plaintiff claims the goods under colour of a deed of gift by which nothing passed, this is not good colour; because, as the property in goods vests by a deed of gift without further ceremony, the defendant, by admitting the deed of gift, admits the property in the goods to be in the plaintiff. In which case, as there remains only a question of fact to be tried, namely, whether there was a deed of gift, the matter is proper for the determination of the jury.

Cro. Jac.  
122.  
Radford v.  
Harbyn.  
10 Rep. 39.

If the matter pleaded in an action of trespass entirely take away the plaintiff's right of action, it is not necessary for the defendant to give colour; because the question in such case can only be, whether the matter pleaded did in fact exist, which is proper for the determination of the jury.

10 Rep. 93.  
Leyfield's  
case.  
Doctr. pl. 77.

If the defendant in an action of trespass *quare clausum fregit*, after deriving title to himself under divers conveyances, plead, that the plaintiff claims under colour of a deed from the last conveyer by which nothing passed, this is not good colour; for he ought to have given colour under the person who first conveyed.

2 Roll. Rep.  
140.  
Allen's case.

If the defendant in an action of trespass *quare clausum fregit* plead, that the plaintiff claims under colour of a feoffment by which nothing passed, this is not good colour; because a feoffment implies a delivery of the possession. But, if he plead, that the plaintiff claims under colour of a deed of feoffment by which nothing passed, this is good colour; because there may not have been a delivery of possession, and nothing does pass under a deed of feoffment, unless possession be delivered.

*Ibid.*

If the defendant justify the seizing of goods, for the taking of which an action of trespass is brought, as a wreck, it is not necessary for him to give colour; it not being material whose the goods were before.

10 Rep. 90.  
Leyfield's  
case.

If an action of trespass be brought for the taking of corn set out for tithe, it is not necessary for the defendant to give colour; it being not material whose the corn was before it was set out for tithe.

10 Rep. 91.  
Leyfield's  
case.

It has been holden, that if the defendant in an action of trespass have omitted to give colour, the plaintiff can only take advantage of the omission by a special demurrer; the giving of colour being a matter of form.

3 Leon. 267.  
Taylor v.  
Fisher.

## 4. Of the Replication:

1. *In the General.*

If the defendant in an action of trespass plead any matter in excuse or justification, the plaintiff must not only reply *de injuriâ suâ propriâ*, but he must also traverse the matter specially pleaded; otherwise no issue can be joined; inasmuch as the words *de injuriâ suâ propriâ* do not amount to an express negative of the matter specially pleaded.

In some cases it is sufficient for the plaintiff in an action of trespass to traverse the matter specially pleaded by the general traverse, which is *absque tali causâ*; in others, the matter specially pleaded must be traversed specially.

8 Rep. 67. If the defendant in an action of trespass plead matter in excuse, Crogate's case. Doctr. Pl. 115. the general traverse is sufficient; because, as no right of doing the act complained of is insisted upon, it is sufficient for the plaintiff to deny that the defendant had such excuse. Finch. 395. 12 Mod. 581.

8 Rep. 67. If the defendant in an action of trespass plead *son assault demesne*, the general traverse is sufficient; because the matter pleaded amounts only to an excuse. Crogate's case. Doctr. pl. 115.

Bro. De son Tort, pl. 18. If the defendant in an action of trespass plead matter of record in justification, this, provided it be material, must be specially traversed; it not being proper that a question arising upon 50. pl. 53. matter of record should be determined by the jury. 8 Rep. 67. 12 Mod. 581.

8 Rep. 67. And for the same reason, if the matter pleaded by the defendant in this action in justification consist as to part of matter of record, there must be a special traverse, notwithstanding it consist as to other part of matter *in pais*. Crogate's case.

2 Leon. 102. But, if the defendant in this action allege matter of record, Parker v. Budon. 12 Mod. 581. 583. merely by way of inducement to another matter specially pleaded, it is not necessary to traverse the matter of record specially.

8 Rep. 67. If the defendant in an action of trespass justify under the process of a court of Admiralty, or of any other court which is not a court of record, the general traverse is sufficient. Crogate's case.

Salk. 628. If the defendant in an action of trespass justify under a right 12 Mod. 582, 583. given by the common law to all persons, the general traverse is sufficient. Finch. Law, 395. Co. Entr. 643.

Finch. Law, 396. But, if the defendant in this action justify under a right of common, or a right of way, the general traverse is not sufficient; for, 8 Rep. 67. as the defendant in such case insists upon a right peculiar to himself, this must be traversed specially. 3 Lev. 107. 12 Mod. 582.

12 Mod. 582. If the defendant in an action of trespass justify the arresting of a man for a breach of the peace, as being a constable, the general Chancey v. traverse

traverse is sufficient; because the justification is under an authority given by the common law to all constables.

Wynn.  
Finch. Law,  
395.

But, if the defendant in this action justify the arresting of a man under a writ or warrant to him directed, the general traverse is not sufficient; but the authority, it being to the defendant in particular, must be specially traversed.

Bro. De M.  
Tort, pl. 14.  
pl. 53.  
Finch. Law,  
395. 12 Mod. 582.

If the defendant in an action of trespass justify under a right given by a publick statute to all persons, the general traverse is sufficient.

Co. Entr.  
643.  
Salk. 628.  
12 Mod. 582.

If the defendant in an action of trespass justify under a licence from the plaintiff, the general traverse is not sufficient: But the licence, it being to the defendant in particular, must be specially traversed.

Finch. Law,  
396.  
8 Rep. 67.

The general rule of law is, that a traverse ought not to be multifarious, but to be confined to one material point.

But this rule does not extend to the general traverse in an action of trespass.

For if the matter pleaded by the defendant in this action in justification consist of divers parts, each of which would, if it had stood single, have been traversable by the general traverse, all these may be traversed by the general traverse; because all may be put in issue thereby.

8 Rep. 67.  
Crogate's  
case.  
2 Leon. 81.  
Cro. Ja.  
599. Salk. 4.

If the plaintiff in an action of trespass traverse the matter pleaded by the defendant by a special traverse, the traverse must conclude with an averment.

Salk. 4.  
Haywood v.  
Davies.  
Co. Entr. 649.

But, if the plaintiff in this action traverse the matter pleaded by the defendant by the general traverse, the conclusion must be to the country.

Salk. 4.  
Haywood v.  
Davies.  
Co. Entr. 651.

If the plaintiff in an action of trespass declare upon a possession, and the defendant justify under a title, it is sufficient for the plaintiff to traverse the title set out by the defendant, without shewing a title in himself; for, if the defendant have no title, the plaintiff ought to recover upon his possession.

Str. 1238.  
Cary v. Holt.  
Cro. Eliz.  
288.  
Poph. 12.

But, if the defendant in this action justify under a title, and it appear from the record, that he was in possession before the plaintiff came into possession, the plaintiff must shew a title in himself, as well as traverse that set out by the defendant; otherwise, although a verdict should be found for the plaintiff, there is no ground for the court to give judgment for him.

Poph. 1, 2.  
Fehner v.  
Fisher.

If the defendant in an action of trespass plead a seisin in *J. S.* under whom he claims, the plaintiff cannot reply a seisin in *J. N.* under whom he claims, without traversing the seisin alleged by the defendant; because the two titles are inconsistent.

Cro. Eliz. 30.  
Herring v.  
Blacklow.  
1 Leon. 78.  
Lutw. 1343.

But, if a title, which is different from that set out by the defendant in this action, but not inconsistent therewith, be insisted upon by the plaintiff, it is not necessary for him to traverse the defendant's title.

Dyer, 171.  
Sir W. Jon.  
352.  
Cio. Car.  
384.

If a lease for years, the date of which is antecedent to the commencement of the defendant's title, be replied by the plaintiff in an action of trespass *quare clausum fregit* to a plea of freehold, it is not necessary to traverse, that the close in which the trespass is charged is the freehold of the defendant; because the two titles are not inconsistent.

Sir W. Jon.  
352. Key  
v. Koke.  
Dyer, 171.  
Cockerel v.  
Armstrong.  
E. 11 C. 2.  
C. B. Bull.  
N. P. 93.

But, if such lease be replied by the plaintiff in this action to a plea of feoffment, the title of the defendant must be traversed; because the two titles are inconsistent.

[If in trespass for taking a gelding (or other chattel) the defendant plead, that the place where is 100 acres, and that J. S. is seised thereof in fee, and that he as his servant, and by his express orders, took the gelding (or other chattel) damage-feasant, the plaintiff cannot reply *de injuriâ suâ propria absque tali causâ*, for that would put in issue three or four things; but he must traverse one thing in particular.]

Cro. Ja.  
594. Rich-  
man v. Cox.  
Trin.  
18 Ja. 1.

It seems to have been doubted formerly, whether there must not always be a new assignment, where the plaintiff in an action of trespass *quare clausum fregit* has not given a name to his close, and the defendant has pleaded, that the close in which the trespass is charged is his freehold.

Lutw. 1399.  
Hustler v.  
Raines,  
Trin. 5 W. 3.

But it has been since holden, that the plaintiff in this action has in such case an election either to make a new assignment, or to reply that the close in which the trespass is charged is his freehold, with a traverse of its being the freehold of the defendant.

Lutw. 1399.  
Hustler v.  
Raines.  
1 Inst. 126.

But, if the plaintiff in such case reply, that the close in which the trespass is charged is his freehold, he must conclude to the country; for, although the matter pleaded by the defendant be not expressly denied by the replication, yet it contains matter so sufficiently negative of the matter pleaded by the defendant, that an issue may be taken upon it.

Ld. Raym.  
233.  
Trupcot v.  
Carpenter.

If the defendant in an action of trespass justify under the process of an inferior court, the plaintiff cannot reply, that the cause of action did not arise within the jurisdiction of the court; for, as the jurisdiction was not pleaded to, he shall not be received to say, that the cause of action did not arise therein.

Ld. Raym.  
465, 466.  
Greenvelt  
v. Burwell.

If the defendant in this action justify an arrest under a sufficient warrant, the plaintiff cannot reply that the arrest was not made under such warrant; but he ought to traverse the defendant's having had such warrant at the time of the arrest: For although the defendant did declare at the time of the arrest, that he arrested the plaintiff under an insufficient warrant; yet if he had at that time a sufficient warrant, he may, in case an action be brought against him for the arrest, justify under the latter.

Bro. Repl.  
pl. 54.  
Bro. Trav.  
pl. 267.

If the defendant in an action of trespass justify the taking of corn, as having been set out for the tithe of corn which grew in a close called *A.* in the parish of *B.* the plaintiff cannot in his replication traverse the growing of the corn in this close; for, if it grew any where within the parish of *B.* the person entitled to the tithe of corn in that parish had a right to take it: But the plaintiff may traverse the growing of the corn in the parish of *B.*

If the defendant in an action of trespafs *quare clausum fregit* plead, that being the servant of *J. S.* he by the command of *J. S.* put a beast, the property of *J. S.* who had a right of common there, into the close in which the trespafs is charged, the plaintiff may reply, that he put in a beast of his own, without traversing the having put in the beast of *J. S.*, for the defendant may have put in a beast of his own as well as one of *J. S.* But the defendant may in his rejoinder traverse the having put in a beast of his own.

Bro. Trav.  
pl. 385.

If the defendant in an action of trespafs plead, that his beast went into the plaintiff's close through a fence belonging to the plaintiff, which was out of repair, the plaintiff may reply, that it went through another fence, without saying what fence or traversing its having gone through his fence: For, if the beast did not go through the plaintiff's fence, it is quite immaterial what fence it did go through.

Sty. 357.  
Baker v.  
Andrews.

If the defendant in an action of trespafs, who had a licence in law to do the act complained of, justify under the command of another, the plaintiff cannot traverse the command in his replication; because the pleading thereof was not necessary.

3 Lev. 113.  
Bridgwater  
v. Betheway.

It has been holden, that if the defendant in an action of trespafs, *quare clausum fregit* justify the entering into the close in which the trespafs is charged by the command of *J. S.* in whom the freehold is alleged to be, the plaintiff is not obliged to traverse in his replication, that the close is the freehold of *J. S.* or to shew a title in himself; it being sufficient to traverse the command.

Bro. De son  
Tort, pl. 130.

But it is laid down in other books, that it is in such case necessary for the plaintiff to traverse in his replication that the close is the freehold of *J. S.*, for that the command is not traversable.

Salk. 107.  
6 Rep. 24.  
Doctr. Pl.  
352.

And it is in one of these books laid down, that a traverse of the command in such case would be an admission that the close is the freehold of *J. S.*, and consequently it would take away the plaintiff's right of action; because the injury would then have been done to *J. S.* and not to the plaintiff.

Salk. 107.  
Trevillian  
v. Pine.

If the defendant in an action of trespafs *quare clausum fregit* justify the distraining of a beast damage-feasant by the command of *J. S.*, in whom a right of distraining is alleged to be, the plaintiff may traverse the command in his replication; for, although it be thereby admitted that *J. S.* had a right to distrain, the defendant, unless he had the command of *J. S.* to distrain, has done an injury to the plaintiff.

Salk. 107.  
Trevillian  
v. Pine.  
6 Rep. 24.  
2 Leon. 196.  
215.  
Ld. Raym.  
309.

It is laid down, that if the defendant in an action of trespafs justify as bailiff of *J. S.* it is not necessary for the plaintiff to traverse his having acted as bailiff of *J. S.*

Cro. Eliz.  
14. The  
Earl of Bed.  
ford's case. 1 Roll. Rep. 46.

But it is in other books laid down, that the having acted as bailiff of *J. S.* must in such case be traversed.

1 Leon. 50.  
2 Leon. 196.  
216. 3 Lev. 20.

If the defendant in an action of trespafs justify the distraining of a beast damage-feasant as bailiff of *J. S.*, the plaintiff cannot reply, that the defendant distrained the beast without the command

3 Lev. 20.  
Dobson v.  
Douglas.  
Salk. 107.

mand of *J. S.*; because, as every bailiff has a general authority to distrain, the command of *J. S.* was not necessary to enable the defendant to distrain.

## 2. Of making a new Assignment.

A new assignment in an action of trespass is an ascertainment by the plaintiff, in his replication, of the place where, or the time when, the trespass charged in his declaration was committed.

Salk. 453.  
Helvis v.  
Lamb.  
6 Mod. 119. If the plaintiff, in his declaration in an action of trespass *quare clausum fregit*, charge a trespass in a close in the parish of *B.*, and the defendant justify doing the act complained of in a close in the parish of *B.* named in his plea, which is his freehold, the plaintiff may in his replication make a new assignment.

Salk. 453.  
Helvis v.  
Lamb.  
6 Mod. 119. And it is necessary for the plaintiff so to do; otherwise, if it be proved at the trial, that there is a close in the parish of *B.* which is the freehold of the defendant, there must be a verdict for him; because the plaintiff has not ascertained his close by name.

Dyer, 23.  
Anon. But, if, in an action of trespass *quare clausum fregit*, a trespass be charged in a close in the parish of *B.* belonging to the plaintiff; and the defendant justify the doing of the act complained of in a close containing six acres in the parish of *B.* which is his freehold; and the plaintiff reply, that the close in which the trespass is charged containing six acres in the parish of *B.* is his freehold; and it appear in evidence, that the plaintiff has a close containing six acres in the parish of *B.*, and the defendant another close containing six acres in that parish, there must be a verdict for the plaintiff; because, as the defendant has not given a name to his close, it was not necessary for the plaintiff to ascertain his close by name; inasmuch as the plea of the defendant shall be intended to relate to the close of the plaintiff.

1 Freem.  
238.  
Carth. 176. It has been doubted, whether the plaintiff can make a new assignment as to the place in an action of trespass, except it be an action of trespass *quare clausum fregit*.

Cro. Ja.  
141.  
Salk. 453. But it seems to be the better opinion, that the making of a new assignment is not confined to this action.

1 Freem. 238. 246. 6 Mod. 120.

It is indeed true, that the plaintiff cannot make a new assignment as to the place in an action of trespass, which is brought for a transitory trespass.

Carth. 176.  
Alstone v.  
Hutchinson. But it is likewise true, that it is never necessary to make a new assignment as to the place where the trespass is transitory; because the place is never material in such trespasss.

Cro. Ja.  
141.  
Batt v.  
Beadley.  
Salk. 453.  
Ld. Raym.  
121. But, if an action of trespass be brought for taking goods, and the defendant justify the taking of them damage-feasant in a place named in his plea, the plaintiff may by a new assignment charge, that they were taken in a place different from that in which the defendant has justified; for the trespass, which is in its nature transitory, is by this plea made local, and consequently the place becomes material.

As

As only damages can be recovered in an action of trespass, a new assignment as to the place is good, notwithstanding the trespass is charged to have been committed upon a larger quantity of land than is mentioned in the declaration. Winch, 65.  
Avis v.  
Gennie.

If by the defendant's plea in an action of trespass the time be made material, the plaintiff may make a new assignment as to this.

If the defendant in an action of trespass plead *son assault demesne* at one hour of the day, upon which an assault and battery are charged, the plaintiff may by a new assignment charge another assault and battery at another hour of the same day. 6 Mod. 112.  
Elwis v.  
Lomba.

And if the plaintiff do not in this case make a new assignment, there must be a verdict for the defendant, provided he prove that the plaintiff did make an assault upon him at any time of the day mentioned in the declaration, although the defendant did make an assault upon the plaintiff at another time of the same day. Ibid.

If the plaintiff in an action of trespass make a new assignment, either as to the time or place, he must conclude with an averment. Lutw. 1401.  
Hustler v.  
Raines.

The certainty which is required in the declaration in an action of trespass has been already shewn. Ante, p.  
206.

It is sufficient to say in this place, that as the replication in this action is, so far as it contains a new assignment, a new declaration, the same certainty is required as to that part of the replication which contains a new assignment, as is required in the declaration. Dyer, 264.  
Anon.

As the replication in an action of trespass is, so far as it contains a new assignment, a new declaration, the defendant may in his rejoinder plead new matter in justification: [and if necessary, he may plead double.] Moor, 540.  
Odiham v.  
Smith.  
Bro. Tresp.  
pl. 3. pl. 168.

But the defendant can only plead new matter in his rejoinder, as to so much of the replication as contains a new assignment; for if any part of his plea be traversed in the replication, the defendant cannot as to this plead new matter, but must stand by what he had before pleaded. Cro. Eliz.  
812.  
Prettyman  
v. Lawrence.

The defendant in an action of trespass cannot in his rejoinder aver, that the place or time, newly assigned in the replication, is the same that is mentioned in the plea; for he shall not be received to say, that either of these is the same, when the plaintiff has by making a new assignment averred that it is different. Bro. Tresp.  
pl. 3. pl.  
168.  
Cro. Eliz.  
355. 493.

Nor is it necessary for the defendant to do this: the plaintiff being estopped, by having made a new assignment, from giving evidence of the commission of a trespass in the place or at the time mentioned in the plea. Bro. Tresp.  
pl. 3. pl.  
168.  
Cro. Eliz.  
355. 493.

[In order to avoid a new assignment, it is the practice to insert two counts in the declaration. The first charges an injury done to the land, and taking the goods there: that is in its nature local, and must be proved where laid. Then the reason, and almost the only one, for adding the second count, is, to avoid the locality: it is for taking goods *generally*. That is of a transitory kind, and may be supported, though the taking be proved to be elsewhere. There cannot be a new assignment, but where there is a special plea. And if the case be such that, on a special plea, the Bull. N. P.  
17. 1 Term  
Rep. 479.

the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty.]

### (K) Of the Evidence in an Action of Trespafs.

1 Inst. 283.  
Cro. Eliz.  
32.  
5 Mod. 286.

IF the time be not material in an action of trespafs, evidence may be given of a trespafs committed at any time before the bringing of the action, although it were committed after the time mentioned in the declaration.

Skin. 641.  
Wilson v.  
Powell.  
Salk. 639.

If the trespafs charged in an action of trespafs be not laid with a *continuando*, the plaintiff can only give evidence of one trespafs.

Ld. Raym. 240.

Skin. 641.  
Wilson v.  
Powell.

Although the trespafs charged in an action of trespafs be laid with a *continuando* for the whole time, from the day on which the first trespafs is charged in the declaration until a subsequent day therein mentioned, it is not necessary for the plaintiff to prove a continuance of the trespafs for the whole time.

Str. 1055.  
Webb v.  
Turner.  
Andr. 250.  
S. C.  
2 Mod. 253.

If the declaration in an action of trespafs charge a trespafs with a *continuando* to a time subsequent to the bringing of the action, evidence may be given of a continuance to the time of bringing the action; because the plaintiff may recover for the continuance to this time.

2 Bulst. 283.  
Willamore  
v. Bamford.

If the plaintiff in an action of trespafs *quare clausum fregit* have set out a title, in a case wherein it was not necessary so to do, it is not necessary to prove the title.

2 Roll. Abr.  
677.  
Dyer, 161.

Every abuttal of the close in which the trespafs is charged, which is set out in the declaration in an action of trespafs *quare clausum fregit*, must be proved with some degree of exactness.

2 Roll. Abr.  
677.  
Nowell v.  
Sands.

If the trespafs charged in this action be alleged in a close abutting towards the south upon a windmill in the occupation of J. S., it must not only be proved that the close did abut towards the south upon a windmill, but that the windmill upon which it did abut was in the occupation of J. S.

But it is not necessary that an abuttal should be proved precisely as it is set out in the declaration in an action of trespafs *quare clausum fregit*.

2 Roll. Abr.  
688. Nowell  
v. Sands.

If the trespafs charged in this action be alleged in a close abutting towards the south upon a windmill, it is sufficient to prove that there is a windmill towards the south of the close, although it likewise come out in evidence, that there is a highway between the close and the windmill.

2 Roll. Abr.  
678.  
Mildmay v.  
Dean.

If the trespafs charged in this action be alleged in a close abutting upon a close called A. towards the east; and it be proved, that the situation of the close called A. is towards the north of the close in which the trespafs is charged; yet, if it be likewise proved, that it is a point or two towards the east thereof, this is sufficient proof of the abuttal.

Salk. 452.

It is laid by Holt, Ch. J. that, if the *venue* in an action of trespafs *quare clausum fregit* be laid in the parish of *Needham*, it is not sufficient for the plaintiff to prove a trespafs in the parish of *Needham Market*.



If the declaration in an action of trespass charge the taking of a stack of corn, and the plaintiff only prove the taking of eight comb of corn out of the stack, he is entitled to recover for so much.

2 Roll. Abr.  
684. pl. 6.

But, if an action of trespass be brought for cutting down trees, and the plaintiff only prove a lopping of the trees, he is not entitled to recover. And it is said that the plaintiff in this action cannot recover, if it appear in evidence that the trees were stubbed.

Dyer, 26,  
27.  
2 Roll. Abr.  
720.

If an action of trespass be brought for the mesne profits of premises, which have been recovered in an action of ejectment, it is sufficient, whether the action be brought in the name of the nominal plaintiff, or of the lessor of the plaintiff, to prove the value of the premises; for the defendant cannot in either case controvert the title of the plaintiff.

1 Sid. 239.  
1 Barn. 456.  
[*Vide supra*,  
tom. 2. pag.  
437-8-9.]

If after judgment by default against the casual ejector an action of trespass for the mesne profits be brought by the lessor of the plaintiff, in the name of the nominal plaintiff in the action of ejectment, he cannot recover, unless he prove an actual possession of the premises in himself.

Barn. 456.  
Stany-  
nought v.  
Cosin.

An action of trespass for the mesne profits was brought by the lessor of the plaintiff, in the name of the nominal plaintiff in the action of ejectment, after judgment by default against the casual ejector. At the trial of the cause the plaintiff proved the judgment, the writ of possession and the return of possession delivered thereupon, the occupation of the premises by the defendant, and the value thereof. It was insisted, that, as the judgment was against the casual ejector and not against the tenant in possession, all this did not sufficiently prove an actual possession in the lessor of the plaintiff: but Lord *Mansfield*, Ch. J. before whom the cause was tried, was of opinion that it did; and all the judges, upon the case being referred to them, concurred with him in opinion. The opinion of the judges, which was delivered by Lord *Mansfield*, was to this effect:—Although the names of fictitious parties are made use of in an action of ejectment, the lessor of the plaintiff and the tenant in possession are to be considered as the real parties; and if so, the lessor of the plaintiff does as well obtain an actual possession by the delivery of possession under a writ of possession, when the judgment is by default against the casual ejector, as when it is upon a verdict against the tenant in possession.

MS. Rep.  
Affin v.  
Parkin,  
Mich.  
32 G. 2.  
in B. R.  
[S. C.  
2 Burr. 665.]

In a case reserved in an action of trespass it was stated, that the property in a certain wall was in the plaintiff, and that he had not many years ago built a summer-house thereupon; but that the occupiers of a house in which the defendant dwelt had from time to time, for fifty years past, nailed fruit trees to the wall; and the question was, If this was evidence of such a possession of the wall in the defendant as ousted the plaintiff of his possession, and consequently took away his right of action against the defendant for nailing fruit trees thereto. It was holden not to be so. And by *Pratt*, Ch. J.—The long enjoyment would perhaps have been evidence of a licence to nail fruit trees to the wall, in case a licence had been pleaded: but if this should be allowed to be evidence of possession of the wall in the defendant sufficient to

MS. Rep.  
Hawkins v.  
Waller,  
Trin. 3 G. 3.  
in C. B.

oust the plaintiff of his possession, it would tend to introduce confusion of property; it being the practice in all places for persons to nail fruit trees to the walls of their neighbours. The case which has been cited, wherein it was holden that *J. S.* had the possession of a mine, although it was under ground in the possession of *J. N.* is not like the present case. In that case *J. S.* was in the actual possession of the mine, and the only question was, Whether, as his possession had been obtained by beginning to dig in ground in his own possession, and afterwards digging secretly under ground in the possession of *J. N.*, it was a rightful one: but in the present case the defendant never was in the possession of the wall; for the plaintiff has all along been in the possession thereof, and not many years ago built a summer-house thereupon.

*Cro. Eliz.*  
493.  
*Freeston v.*  
*Crouch.*

If the defendant in an action of trespass *quare clausum fregit* justify in a close by name, the plaintiff, if he make a new assignment, cannot give evidence of a trespass in the close justified in; for by making a new assignment he has waived the right of doing this.

1 Sid. 225.  
*Sippora v.*  
*Rasset. Cio.*  
*Ja. 534.*

It is in the general true, that the plaintiff in an action of trespass cannot give evidence of any injury, which is not expressly charged in the declaration. But, where an injury arises *ex turpi causa*, as from debauching a daughter of the plaintiff, the law, for the sake of preserving the chastity of the record, does allow this to be given in evidence in an action of trespass under the general words *and other wrongs*.

If an injury for which an action of trespass lies, be charged in the declaration, the plaintiff may, after proving this, give evidence of any circumstance charged in the declaration, which attended the injury, in aggravation of damages; although an action of trespass could not be maintained on the account of that circumstance alone.

*Salk. 642.*  
*Newman v.*  
*Smith.*

The declaration in an action of trespass charged the breaking and entering of the plaintiff's house, and the beating of his children; and there was a general verdict for him with entire damages. On a motion in arrest of judgment it was insisted, that the plaintiff could not recover for the beating of his children; because it is not alleged, that he had received any special damage from thence. It was holden that the plaintiff ought to have judgment. And by the court—This action is brought for breaking and entering the house, and what is further alleged is only to shew the enormity of the trespass. The plaintiff cannot recover any damages in this action for the loss of his children's service, nor could he give this in evidence; because he may bring another action for that injury: but he had a right to give the beating of the children in evidence in the present action, it being a circumstance which attended the breaking and entering of his house, in order to aggravate the damages.

*Str. 61.*  
*Dix v.*  
*Brookes.*

The plaintiff in an action of trespass declared, that the defendant broke and entered his house, and made an assault upon his wife. A general verdict being found for the plaintiff with entire damages, it was insisted on a motion in arrest of judgment, that the

the plaintiff, although he has not entitled himself thereto by laying a *per quod servitium amisit*, would by this verdict recover a satisfaction for the assault upon his wife, which he ought not to do: because, as the wife has not joined in this action, a right of action would survive to her, and consequently she might, notwithstanding the recovery of the husband in the present action, hereafter bring another action for the same injury. The rule for arresting the judgment was discharged. And by the court—The plaintiff in an action of trespass may join that in his declaration, in order to aggravate the damages, for which he cannot recover singly; and for which another person may maintain an action. In this case the authority of *Newman v. Smith* was expressly recognized.

Every thing which amounts to a denial of the right of action may be given in evidence by the defendant in an action of trespass upon the general issue.

A lease for years may be given in evidence in an action of trespass *quare clausum fregit* upon the general issue; because this, which is a denial of the possession of the plaintiff, amounts to a denial of the right of action.

But a lease at will cannot in this action be given in evidence upon the general issue; because such lease, which amounts only to a licence, ought to have been pleaded.

An action of trespass *quare clausum fregit* being brought for breaking the close and eating the germins of the plaintiff there growing, it appeared, that the defendant claimed under a lease for years, in which there was a reservation of the trees; that some of the trees had been cut down; and that the germins, for the eating of which by the defendant's cattle the action was brought, grew from the roots thereof. It was holden, that as the defendant, who had a right of depasturing his cattle in the close, could not prevent them from eating the germins, the right of eating them might be given in evidence upon the general issue; because it amounted to a denial of the right of action.

If an action of trespass be brought for taking a personal chattel, the defendant may upon the general issue give in evidence a gift thereof by the owner; because this, which amounts to a denial of the plaintiff's property, is a denial of the right of action.

But the taking of a personal chattel as a deodand cannot be given in evidence by the defendant in this action upon the general issue; because, as this does not amount to a denial of the plaintiff's property, it ought to have been pleaded, and then the plaintiff would have had an opportunity of giving an answer thereto.

If one tenant in common bring an action of trespass *quare clausum fregit* against another, the latter may upon the general issue give in evidence that he is tenant in common with the plaintiff; for this amounts to a denial of the right of action.

But, if one tenant in common bring this action against a stranger, the stranger cannot give in evidence upon the general issue, that *J. N.*, who is not named in the writ, is tenant in common with the plaintiff; because this ought to have been pleaded in abatement.

Bro. Genl.  
Ist. pl. 324.

*Ibid.*

Sir W. Jones  
383.  
Citherdow  
v. Higgs.

1 Inst. 284.  
Bro. Genl.  
Ist. pl. 46.

Str. 61.  
Dryer v.  
Mills.

Salk. 4.  
Haywood  
v. Davies.

*Ibid.*

1 Inst. 283.  
Salk. 287.  
12 Mod.  
412.

It is in the general true, that the defendant in an action of trespass cannot give any matter in evidence upon the general issue, which amounts to a justification or excuse of the act complained of, or to a discharge of the trespass; because every such matter, as it does not amount to a denial of the right of action, ought to have been pleaded.

Cro. Eliz.  
245. Taylor  
v. Fisher.  
Bro. Tresp.  
pl. 295. [2 Term Rep. 168.]

A licence cannot be given in evidence in this action upon the general issue; because this ought to have been pleaded in justification.

1 Inst. 283.  
Keilw. 203.

The defendant in this action cannot give in evidence upon the general issue, that his beast escaped into the plaintiff's close through the fence of the plaintiff which was out of repair; because this ought to have been pleaded in excuse.

But the defendant in an action of trespass is in divers cases enabled by statutes to give the special matter in evidence upon the general issue, notwithstanding it amounts to a justification.

By the 7 Jac. 1. c. 5. it is enacted, "That if an action of trespass be brought against any justice of the peace, mayor, or bailiff of any city or town corporate, headborough, portreeve, constable, tythingman, or collector of any subsidy, for any thing by him done by virtue or reason of his office; or against any other person, for any thing by him done in aid or assistance of or by the commandment of either of these touching or concerning his office, it shall be lawful for the defendant to plead the general issue, and to give any special matter in evidence, which, had it been pleaded, would have been sufficient in law to have discharged such defendant of the trespass."

By the 11 G. 2. c. 19. § 2. it is enacted, "That if an action of trespass be brought against a person entitled to rents or services of any kind, or his or her bailiff, receiver, or other person, relating to any entry by virtue of this act, or otherwise, upon any premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon; it shall be lawful for the defendant in such action to plead the general issue, and to give the special matter in evidence, any law or usage to the contrary notwithstanding."

¶ See also  
Doug. 283.  
2 Bl. Rep.  
1254.]

And without mentioning any other statute in particular, it may in the general be observed, that in almost every statute, which has of late years been made for amending a highway, or for doing any thing of publick concern, there is a clause to the same effect.

6 Mod. 135.  
Dove v.  
Smith.

It is in the general true, that the defendant in an action of trespass cannot give a matter in evidence upon the general issue, which might have been pleaded in bar.

But in some cases a matter which cannot be pleaded in bar of an action of trespass, may be given in evidence by the defendant upon the general issue in mitigation of damages.

Exo. Gen.  
1st. pl. 11.  
vi. 15.

It cannot be pleaded in bar of an action of trespass, that the goods for the taking of which it is brought have been restored to the plaintiff;

plaintiff: but this may be given in evidence by the defendant on the general issue in mitigation of damages; for although the plaintiff be entitled to recover, he ought only to recover damages for taking the goods, and detaining them until they were restored.

If an action of trespass be brought by a rightful executor against an executor *de son tort*, the latter cannot plead payment of the testator's debts, to the amount of the assets which came to his hands in bar of the action: but he may give this in evidence upon the general issue in mitigation of damages. 12 Mod. 441.

If an action of trespass be brought by a husband for criminal conversation with his wife, the defendant cannot plead a licence from the husband, because a husband has not a power to grant such licence in bar of the action; or that the wife was a lewd woman, because it does by no means follow, that he had a right to do what he is charged with having done; but he may give either of these matters in evidence upon the general issue in mitigation of damages. 12 Mod. 232. Coote v. Barty. [But the husband's consent goes not in mitigation of damages, but in bar of the action. *Volenti non fit injuria.*]

## Trial.

THERE are several methods of trial which have for many years been discontinued, of which it would not be foreign to the present title to give an account: but as this has been done by divers authors, and nothing new can be thereto added, they are omitted.

As divers things, which might very well have been treated of under this title, have already been treated of under the titles *Actions Local and Transitory*, *Bill of Exceptions*, *Evidence*, and *Jurors*, it is not necessary to repeat any of these.

Another thing which might likewise very well have been treated of under this title, namely *Verdict*, shall be treated of under the title *Verdict*.

The remaining matter which appertains to this title shall be arranged in the following order:

### (A) Of a Trial by the Court.

1. In the General.
2. Upon Inspection.
3. Upon the Examination of Witnesses.

- (B) Of a Trial by a Record.
- (C) Of a Trial by a Certificate,
- (D) Of a Trial by a Jury.
- (E) Of a Trial at Bar.
- (F) Of a Trial at *Nisi Prius*.
- (G) Of Notice of Trial.
- (H) Of putting off a Trial.
- (I) At what Time an Indictment may be tried before Justices of *Oyer and Terminer*.
- (K) Of the Manner of trying, where more than one Issue is to be tried.
- (L) Of granting a new Trial.

1. In the General.
2. After a Trial at Bar.
3. On account of a Defect or Mistake of the Judge before whom the Cause was tried.
4. On account of a Defect, Mistake, or Fault of the Jury by whom the Cause was tried.
5. On account of a Neglect or Mistake of a Counsellour or an Attorney in the Cause.
6. On account of a Neglect, Mistake, or Fault of one of the Parties, or one of his Witnesses.
7. In an action of Ejectment.
8. In a Penal Action.
9. In an Indictment or Information.

### (A) Of a Trial by the Court.

#### 1. In the General.

1 Inst. 125.

EVERY question of law arising in a cause is to be tried by the court, it being an universal maxim, that *cuilibet in arte sua perito est credendum*; and it being a maxim of law, that *ad questionem juris non respondent juratores*.

Bro. Trial,  
Pl. 143.

If a question arise, whether a certain sentence be a maxim of law, it is to be tried by the justices.

9 Rep. 30.  
Abbot of  
St. Mary's  
case.  
2 Mod. 572, 573.

A question concerning the practice of a court is to be tried by the court; for the practice of every court is the law of that court.

Bro. Trial,  
Pl. 143.  
2 Inst. 621.

It is the province of the justices to determine, what the meaning of a word or sentence in an act of parliament is.

If

If a man, who at the time of his death was seized of a house, had any goods therein, his executors or administrators shall have a reasonable time to take them away; and the justices shall judge what is a reasonable time. 1 Inst. 56.

The reasonableness of a fine, which has been assessed by the lord of a manor on the admission of a tenant to a copyhold estate, shall be determined by the justices upon the circumstances of the case. Ibid.

If a question arise concerning the existence of a general custom, it is to be tried by the justices; because every general custom is a part of the common law. Bro. Trial, pl. 143.  
12 Mod. 573.

It is in the general true, that a question concerning the existence of a custom of a particular place, is to be tried by a jury. Bro. Trial, pl. 143.

But, if a question arise concerning the existence of a custom of the city of *London*, it is, unless the corporation be interested in the establishment of the custom, to be tried by the certificate of the mayor and aldermen. 1 Inst. 74.  
2 Roll. Abr. 579, 58c.

A question concerning the legal effect of a deed is to be tried by the court; because this, which depends upon the construction of the deed, is a question of law. 1 Inst. 225.  
Bro. Condition, pl. 183.  
2 Freem. 146.

If a question arise, whether a deed have been sealed and delivered, this, it being a question of fact, is to be tried by a jury. 1 Inst. 225.

It is the province of a jury to try, whether a rasure or interlineation in a deed were made before the delivery of the deed, this being a question of fact. Ibid.

But, if the question be, whether the rasure or interlineation in a deed be of a thing material, it is to be tried by the court; because this question, which depends upon the construction of the deed, is a question of law. Ibid.

## 2. Upon Inspection.

[Trial by inspection, or examination, is, when for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For, where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it, who are properly called in to inform the conscience of the court in respect of *dubious* facts: and therefore when the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof, there, the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.] 3 Bl Comm. 331.

If a person would avoid or reverse an act, because it was done during his nonage, the question, whether he were of full age at the

time it was done, is sometimes to be tried by a jury, at other times by the court upon inspection of the person.

1 Inst. 380. If the act, which a person would avoid, because it was done during his nonage, were an act *in pais*, the question, whether he were of full age at the time it was done, is to be tried by a jury.

1 Inst. 380. But, if a person would avoid or reverse a judicial act because it was done during his nonage, the question, whether he were of full age at the time it was done, is to be tried by the court upon inspection: for every judicial act shall be intended to have been rightly done until the contrary appear; and it is more proper, that it should be tried by the court than by a jury, whether the act were rightly done.

*Ibid.* An act *in pais*, which is voidable because it was done during nonage, may be tried by the court upon inspection, after the party who would avoid or reverse it is of full age.

1 Bulstr. 206. There is some disagreement in the books as to the point: but it seems to be the better opinion, that a judicial act cannot be tried by the court upon inspection, after the party who would avoid or reverse it is of full age.

1 Inst. 380. If there have been a trial by the court upon inspection during the nonage of a person, and he be recorded to be within age, a judicial act may be avoided or reversed by him after he is of full age, because it was done during his nonage.

Moor, 189. If the consuee delay the engrossing of a fine, of which an infant is consufor, the court will at the prayer of the infant try his age by inspection, in order to prevent him from being precluded from bringing a writ of error, in case he should be of full age before the fine is engrossed.

Cro. Eliz. 616. If a writ of error be brought to reverse a fine, and the error assigned be nonage of the plaintiff in error at the time of levying the fine, the question, whether he be of full age, is to be tried by the court upon inspection.

2 Roll. Abr. 572. pl. 2. 9 Rep. 30.

1 Inst. 380. If a writ of error be brought to reverse a recovery by default in a real action, and the error assigned be nonage of the plaintiff in error at the time of suffering the recovery, the question, whether he be of full age, is to be tried by the court upon inspection.

1 Sid. 322. But, if a recovery have been suffered against the attorney of a person, and, upon a writ of error brought to reverse it, the error assigned be nonage of the plaintiff in error at the time of making the warrant of attorney, the question, whether he be of full age is to be tried by a jury; because, the making of the letter of attorney was an act *in pais*.

10 Rep. 43. If an *audita querela* be brought to avoid a recognizance, because it was entered into during the nonage of the plaintiff, the question, whether he be of full age, is to be tried by the court upon inspection.

2 Roll. Abr. 572. pl. 9. It is laid down in one book, that if in an action of account issue be joined upon the plea of infancy, the question, whether the de-  
fendant



defendant be of full age, is to be tried by the court upon inspection.

But it is in another book laid down, that the question, whether a person be of full age, is always to be tried by a jury, unless the validity of a judicial act depend upon the question. 1 Inst. 380.

In an appeal of maihem the court may, at the prayer of the defendant, try upon inspection of the part, whether there be a maihem. Bro. Appeal, pl. 46.  
Bro. Trial, c. 23. § 27.  
pl. 57. 2 Hawk. Pl. C.

As the court have a power, in case the defendant in an appeal of maihem pray it, to try upon inspection of the part whether there be a maihem, the plaintiff in an appeal must always appear in person, that the court may have an opportunity, in case it should be so tried, of inspecting the part. Bro. Trial, pl. 57.  
2 Hawk. Pl. C. c. 23. § 27.

If, where the trial is by the court upon inspection, there be a doubt upon inspecting, the court has a power of requiring or receiving other evidence. 2 Roll. Abr. 573. pl. 2.

If the question whether *J. S.* be of full age is tried by the court upon inspection, *J. S.* may at the time of inspection be examined by the court upon a *voir dire* concerning his age. Ibid.

An *audita querela* being brought to avoid an execution upon a recognizance, and the age of the recognizor being tried by the court upon inspection, the court examined his mother and another witness concerning the age of the party inspected; who both swore that he was not of full age. The court, being still doubtful, ordered a copy of the register of the parish where he was born to be produced. Carth. 278, 279. Lloyd v. Eagle.  
2 Roll. Abr. 573. pl. 4.

If the court upon inspecting the part in an appeal of maihem be doubtful whether there be a maihem, a writ may be awarded to the sheriff, to return some able physicians and surgeons for the better information of the court. Bro. Appeal, pl. 46.  
Bro. Trial, pl. 57.  
2 Hawk. Pl. C. c. 23. § 27.

[If a man be found by a jury an idiot *a nativitate*, he may come in person into the Chancery before the chancellour, or be brought there by his friends, to be inspected and examined, whether idiot or not: and if, upon such view and inquiry, it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void, and instantly of no effect. 9 Rep. 31.

Upon a writ of error from an inferior court, that of *Lynn*, the error assigned was, that the judgment was given on a *Sunday*, it appearing to be on 26th *February*, 26 *Eliz.* and upon inspection of the almanacks of that year it was found, that the 26th of *February* in that year actually fell on a *Sunday*: this was held to be a sufficient trial, and that a trial by jury was not necessary, although it was an error in fact; and so the judgment was reversed.] Cro. Eliz. 227.

If the court after having inspected, and receiving other evidence, be still doubtful, it has a power of refusing to determine the matter in question, and may send it to be tried by a jury. Bro. Trial, pl. 60.

## 3. Upon the Examination of Witnesses.

6 Rep. 32. Every question, which arises upon a challenge to the array of the jury, is to be tried by the court upon the examination of witnesses; for unless every such question, although it depend upon a matter of fact, be so tried, there would be a delay of justice.

Cro. Eliz. 616. If a question arise, whether a piece of written evidence were delivered by one of the parties to the jury after they went from the bar, it is to be tried by the court upon the examination of witnesses.

9 Rep. 30. The defendant pleaded, that the plaintiff who had appeared by attorney was dead. Hereupon a person came into court, and said he was the plaintiff. This being denied by the defendant, it was holden to be a proper question for the determination of the court upon the examination of the attorney, whether this were the person for whom he had appeared.

Bro. Trial, pl. 36. If in a writ of dower the issue be, whether the husband of the woman claiming dower be living, the issue is to be tried by the court upon the examination of witnesses.

Bro. Trial, pt. 90. If an appeal be brought by a woman of the death of her husband, and the defendant plead that the husband is living, and issue be thereupon joined, the issue is to be tried by the court upon the examination of witnesses.

2 Roll. Abr. 578. pl. 13. If a question arise concerning a fact suggested to have been done beyond the seas, it is to be tried by the court upon the examination of witnesses; for a jury cannot be supposed to have any knowledge either of the fact, or of the witnesses who may be adduced to prove it.

Bro. Trial, pt. 60. If upon a trial by the court of a question of fact upon the examination of witnesses the court be doubtful, it has a power, provided it be not suggested that the fact was done beyond the seas, of sending the question to be tried by a jury.

## (B) Of a Trial by a Record.

9 Rep. 20. EVERY question arising in a cause concerning a matter of record, is to be tried by the record; because a record imports in itself such verity, that an averment contrary thereto is not to be received. The receiving of such averment would moreover be attended with great inconvenience; for if one averment could be received to contradict a record, another might be received to contradict the second record, and so it might go on *ad infinitum*.

Bro. Trial, pl. 40. If an issue be joined upon the plea of *nul tiel* record, it is to be tried by the record.

2 Roll. Abr. 574. If a question arise concerning a privilege claimed by a city or borough under a charter, it is to be tried by the record of the charter.

The question, whether a man be an attorney of a court, is to be tried by the record in which the attainies of the court are enrolled. Trial, pl. 6. *Ld. Raym.* 1173. *Str.* 76. *Forster v. Cale. Bro.*

The question, whether an original writ were sued out, is to be tried by a jury; because the writ is not recorded, until a return be made thereto. *Hob.* 244. *Peter v. Stafford.*

If the question be general, whether a defendant did appear, it is to be tried by the record; because the appearance ought to be entered upon the record. *Cro. Eliz.* 131. *Hoe v. Marthal.*

But, if the question be, whether a defendant appeared at a day certain, it is to be tried by a jury: for it is not necessary, that the day of appearance should be entered upon the record. *Ibid.*

[In case of an alien, whether alien friend, or enemy, shall be tried by the league or treaty between his sovereign and our's, for every league or treaty is of record. *6 Rep.* 53. *3 Bl. Comm.* 331.]

So, whether a manor be held in ancient demesne or not, shall be tried by the record of *domesday* in the king's Exchequer. *9 Rep.* 31.

If the question be, whether a person were rendered at a day certain in discharge of his bail, it is to be tried by the record; because the day of the render ought to be entered upon the record. *Hob.* 210. *Welby v. Canning.*

If the question be, whether a deed be enrolled, it is to be tried by the record of enrolment. *4 Rep.* 71. *Hynde's case.*

But, if the question be, at what time a deed was enrolled, it is to be tried by a jury; because it is not necessary, nor was it formerly the practice, to mention the time of enrolling a deed. *4 Rep.* 71. *Hynde's case.* *2 Roll. Rep.* 219.

If the question be, whether *J. S.* were sheriff of the county of *A.* it is to be tried by the record; because every sheriff is appointed by letters patent, which are always recorded. *9 Rep.* 31. *Abbot of Strata Marcella's case.*

But, if the question be, whether *J. N.* were under-sheriff to *J. S.* it is to be tried by a jury; for the appointment of an under-sheriff is never recorded. *Bro. Trial,* pl. 113.

If a sheriff, after having returned a *cepi corpus*, plead to an action of escape, that the party never was in his custody, the question, whether the party was ever in the sheriff's custody, is to be tried by the record of the return. *2 Roll. Abr.* 574. pl. 7.

But, if a sheriff, who arrested *J. S.* return *non est inventus*, the question, whether *J. S.* were arrested, is to be tried by a jury; because it depends upon the truth of the return, and not upon the import thereof. *2 Roll. Abr.* 574. pl. 8.

If a man justify the having done a thing as a justice of the peace, the question, whether he were a justice of the peace, is to be tried by the record of the commission of peace. *2 Roll. Abr.* 574. pl. 9.

If the question be, whether a person have a right to a peerage under a writ, it is to be tried by the record of the writ: but, if the question be, whether a person have a right to a peerage by descent, it is to be tried by a jury: for it can never appear from the record, that the person claiming the peerage is descended from the person who was first created a peer. *Ld. Raym.* 14. *Rex v. Knollys.* *12 Mod.* 57.

Palm. 524.  
Bigg v.  
Wharton.

If a matter of record be alleged merely by way of inducement to a matter of fact, the trial is to be by a jury; for the question in such case is not concerning a matter of record.

Trial per  
Pais, 156.

If a question arise concerning a decree of the court of Chancery, it is to be tried by a jury; the court of Chancery, *quatenus* a court of equity, not being a court of record.

Bro. Fail. of  
Record,  
pl. 2.

If a record be pleaded, and an issue be joined upon the plea of *nil tiel* record, a day is given to bring in the record.

*Ibid.*

If the record be a record of the court in which it is pleaded, and it be not brought in at the day, this is a failure of record; because it was in the power of the party to bring it in.

Bro. Fail. of  
Record,  
pl. 3.

If the record pleaded be a record of a superior court, and it be not brought in at the day, this is a failure of record; because, as a *certiorari* could not be sent from the court in which it is pleaded for removing the record of a superior court, it was incumbent upon the party who pleaded the record to bring it in. It was moreover in his power to remove the record by a *certiorari* into the court of Chancery, and afterwards to bring it, by a *mittimus*, from the court of Chancery into the court in which it is pleaded.

*Ibid.*

But, if the record of an inferior court be pleaded, and a *certiorari* have been sued out from the court in which it is pleaded to the inferior court, and the record be not returned at the day, this is not a failure of record; because the party who pleaded the record, has not been guilty of neglect: but it is his duty to sue out an *alias certiorari*, and afterwards a *pluries*, and so to continue process, until the record is returned.

Bro. Fail. of  
Record,  
pl. 4.

Although some part of the record pleaded be not set out, this is not a failure of record; for it is not necessary that any more should be set out by the party who has pleaded a record than is material for him.

*Ibid.*

If a man plead a record of a recovery of one acre, and the record brought in is of a recovery of two acres, this is not a failure of record; for if two acres were recovered, one certainly was.

*Ibid.*

If a man declare upon a recognizance of *J. S.* and it appear from the record brought in, that *J. S.* and *J. N.* were jointly and severally liable for the whole sum mentioned in the recognizance, this is not a failure of record; it being sufficient to shew, that *J. S.* was liable for the whole sum mentioned in the recognizance.

A variance in the record brought in from the record pleaded, in an immaterial part, is not a failure of record.

Bro. Fail. of  
Record,  
pl. 1.

If a record of outlawry of the plaintiff at the suit of *J. S.* be pleaded, and the record brought in be of outlawry of the plaintiff at the suit of *J. N.* this is not a failure of record; for the material question is, whether there be a judgment of outlawry of the plaintiff, and not at whose suit the judgment was.

Hob. 179.  
Coachman  
v. Haley.

If the record brought in vary from the record pleaded as to a continuance, this is not a failure of record; the continuance not being a material part of the record.

But

But a variance in the record brought in from the record pleaded, in a material part, is a failure of record.

If a man plead a record of a recovery against him by the name of *Curphey*, and the record brought in be of a recovery against a person of the name of *Scurffee*, this is a failure of record; because it does not appear to be a recovery against the same person.

1 Barn. 333.  
Eggleton v. Seneff.

And for the same reason, if a record of outlawry of the plaintiff by the name of *J. S.* knight be pleaded, and the record brought in be of outlawry of the plaintiff by the name of *J. S. Esq.* this is a failure of record.

Bro. Fail. of Record,  
pl. 11.

If the record of outlawry brought in vary from the record of outlawry pleaded, as to the day of the *exigent*, this is a failure of record, the day of the return of the *exigent* being material.

Dyer, 187.

But, if a record of one day of a term be pleaded, and a record of another day of the same term be brought in, this is not a failure of record; because, as a whole term is but one day in the eye of the law, the variance is not material.

Hob. 209.  
Party v. Paris.  
Hardr. 200.

If, however, the state of the pleadings be such, that the party, who has pleaded a record, ought to shew the precise day of the term of which it is, and the record brought in be of a different day, this a failure of record; notwithstanding it be a record of the same term.

Bro. Fail. of Record,  
pl. 16.

The consequence of a failure of record is, that judgment is given against the party who pleaded the record.

Bro. Fail. of Record,  
pl. 2.

### (C) Of a Trial by a Certificate.

[THE trial by certificate is allowed in such cases, where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the province of the court, the judges must rely on the solemn averment or information of persons in such a station, as affords them the most clear and competent knowledge of the truth. As therefore such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuitry, permits the fact to be determined upon such certificate merely.]

3 Bl. Comm.  
333.

It is in the general true, that if a question arise in a temporal court, concerning a matter which is only triable in a spiritual court, it must be tried by the certificate of the ordinary.

And such question cannot be tried by the certificate of a deputy to the ordinary, unless the ordinary be out of the realm in the king's service.

8 Rep. 68,  
69. Trollop's case.  
1 Inst. 134. Bro. Certif. de Eveque, pl. 30.

But, if a bishoprick be vacant, a question which is triable only in the bishop's court, may be tried by the certificate of the guardian of the spiritualties.

2 Roll. Abr.  
590. Z.  
pl. 2.

If a matter which is only triable in a spiritual court be pleaded in abatement of an action in a temporal court, it is not to be tried by the certificate of the ordinary; because such trial would not in this case be peremptory.

Bro. Certif. de Eveque,  
pl. 22.  
2 Roll. Abr.  
583. pl. 2.

The

2 Show. 53.  
Hill v.  
Boomer.  
Noy, 111.

The question, at what time an act, which is only triable in a spiritual court, was done, is not in the general to be tried by the certificate of the ordinary. But, if the time of doing an act, which is only triable in a spiritual court, be material, such question is to be tried by the certificate of the ordinary.

Bro. Baft.  
pl. 17. pl.  
29. [Besides,  
it would be  
highly im-  
proper to re-  
fer the trial  
of a question

If a question arise in a temporal court concerning special bastardy; namely, whether *J. S.* was born before his father and mother were married; it is not to be tried by the certificate of the ordinary; because the marriage being admitted, the question concerning the time of birth of *J. S.* may be properly tried in the temporal court.

of special bastardy to the ordinary; who, whether the child be born before or after marriage, will be sure to certify him legitimate.]

Bro. Baft.  
pl. 9. pl. 17.  
pl. 29.

It was formerly holden, that if a question arose in a temporal court concerning general bastardy; namely, whether the father and mother of *J. S.* were married; it was in the general to be tried by the certificate of the ordinary; because a question concerning the validity of a marriage can be only tried in a spiritual court.

Bro. Baft.  
pl. 3. pl. 9.

But it was at the same time holden, that if the question did not arise before the death of the person whose legitimacy was in question, it might be tried in a temporal court.

1 Show. 59.  
Allen v.  
Grey.  
Salk. 437.

And it has been for many years holden, that the question, whether there has been a marriage in fact, is in all cases triable in a temporal court; for that the certificate of the ordinary is never necessary, unless the question be whether the father and mother were lawfully married.

Bro. Baft.  
pl. 9.  
Salk. 437.  
1 Lev. 41.

It follows, that as the plea of *ne unques accouple in loyal matrimonie*, which is the only plea whereby the lawfulness of a marriage can be put in issue, is only to be pleaded in a real action; the certificate of the ordinary is not at this day necessary in a personal or mixed action.

1 Lev. 41.  
Basset v.  
Morgan.  
Bro. Baft.  
pl. 9.  
Salk. 437.

In action of debt upon a bond, conditioned for the payment of a sum of money to the plaintiff upon the day of his marriage, the defendant pleaded *ne unques loyalement marrie*. Issue being joined upon this plea, there was a verdict for the plaintiff. In arrest of judgment it was insisted, that the lawfulness of the marriage ought not to have been tried by a jury. But by the court—The material part of this issue is married or not. The plaintiff might have demurred to the defendant's plea, on account of the word *loyalement* being therein contained. As he did not demur but pleaded to issue, and as this is a personal action, wherein the lawfulness of a marriage cannot properly come in question, the trial was well enough.

1 Inst. 133.

If a question arise in a temporal court, whether *J. S.* be under a sentence of excommunication, it is to be tried by the certificate of the ordinary.

Bro. Trial,  
pl. 31. pl. 53.

If a question arise in a temporal court, whether *J. S.* be divorced from his wife, it is to be tried by the certificate of the ordinary.

Where

Wherever the certificate of the ordinary is necessary to the trial of a question in a temporal court, it is also necessary that the certificate be positive as to the fact certified; because the temporal court cannot determine upon any special matter therein contained.

In an action of dower issue was joined upon the plea of *ne unques accouple in loyal matrimonie*. The ordinary being written to by the court, he certified the evidence adduced before him to prove the lawfulness of the marriage; but he did not certify positively that the parties were lawfully married. Upon a motion as of course for judgment for the demandant, the court refused to give judgment; and said it might be moved upon notice of motion to the tenant, who would then have an opportunity of objecting to the sufficiency of the certificate. The certificate was afterwards amended by returning the fact instead of the evidence; and judgment was given for the demandant.

But, if the certificate be positive as to the fact certified, it is sufficient, notwithstanding the evidence upon which the ordinary founded his opinion be therein contained; inasmuch as this is to be rejected as surplusage.

It is not necessary for the ordinary, who certifies that two parties were joined together in lawful matrimony, to mention the day or place of the marriage; because his certificate, provided it be positive as to the fact certified, is conclusive.

[*Ability of a clerk presented, admission, institution, and deprivation of a clerk, shall be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge: but induction shall be tried by a jury, because it is a matter of publick notoriety, and is likewise the corporal investiture of the temporal profits. Resignation of a benefice may be tried in either way; but it seems most properly to fall within the bishop's cognizance.*]

If a question arise concerning the existence of a custom of the city of *London*, it may in the general be tried by the certificate of the mayor and aldermen.

But unless the party, who desires to have a question concerning the existence of a custom of the city of *London* tried by certificate, surmise, that when parties have been at issue concerning the existence of such a custom; it has been usual to try the issue by the certificate of the mayor and aldermen, the question is not to be so tried.

The certificate of the mayor and aldermen of the city of *London*, concerning the existence of a custom of the city, is not to be sent in writing; but is to be delivered at the bar of the court by the mouth of the recorder.

If a question arise, whether there be a custom of the city of *London*, that every man may devise land lying therein, it may be tried by the certificate of the mayor and aldermen.

If in an action of debt upon bond the defendant plead a foreign attachment in *London* by virtue of a custom of this city, and issue

Cro. Eliz.  
789. Baker  
v. Rogers,  
2 Roll. Abr.  
591.

1 Barn. r.  
Easterly v.  
Easterly.

Bro. East.  
pl. 35  
2 Roll. Abr.  
591. pl. 4.  
pl. 6.

Cro. Car.  
351.  
Wickham  
v. Enfield.  
2 Roll. Abr.  
591. pl. 3.

3 Bl. Comm.  
336.  
2 Inst. 632.  
Show. P. C.  
88. 2 Roll.  
Abr. 583.  
&c. Dy. 229.

1 Inst. 74.  
2 Roll. Abr.  
579, 580.  
[4 Burr. 2248.]

1 Inst. 74.  
Bro. Trial,  
pl. 96.

1 Inst. 74.  
2 Roll. Abr.  
579.

2 Roll. Abr.  
580. pl. 5.

2 Roll. Abr.  
580. pl. 3.

be

be joined upon the existence of the custom, it may be tried by the certificate of the mayor and aldermen.

Sir T. Jon.  
149. Leath-  
er Sel.  
Comp. v.  
Beacon.

An action of debt was brought upon a by-law, which ordained, that every person elected to the livery of a certain company should pay twenty-five pounds for the use of the company. The defendant pleaded a custom of the city of *London*, that no person is capable of being elected to the livery of any company, unless he is a freeman of the city, and that he is not a freeman thereof. The plaintiff in his replication denied the existence of the custom, and concluded with an averment. The defendant demurred, because the plaintiff had not concluded to the country. It was holden, that the conclusion was right; for that the existence of the custom may be tried by the certificate of the mayor and aldermen.

Hob. 85.  
Day v.  
Savage.

But, if the mayor and aldermen are interested in the custom, concerning the existence of which the question arises, it is to be tried by a jury.

2 Roll. Abr.  
581. pl. 3.

In an action of trespass for taking the plaintiff's goods, the defendant pleaded a custom of the city of *London*, that if any person, not having a shop in the city, carry goods about the same to sell, he shall forfeit the goods to the mayor, citizens, and commonalty, and that it shall be lawful for any freeman to seize them for the use of the mayor, citizens, and commonalty; and that he, being a freeman, did seize them by virtue of the custom. Issue being joined upon the existence of the custom, it was tried by the certificate of the mayor and aldermen. The trial was adjudged a mis-trial, and the issue was afterwards tried by a jury. And by the court—The existence of a custom, in which the mayor and aldermen of *London* are interested, is not fit to be tried by their certificate: for no man ought to be a judge in his own cause.

Moor, 871.  
Day v.  
Savage.  
2 Roll. Abr.  
579. pl. 2.

The defendant in an action pleaded, that the mayor, citizens, and commonalty of the city of *London* were entitled to a certain sum of money for wharfage, from the owner of every boat brought into *Queenhithe*. The plaintiff replied, that every freeman was, by a custom of the city, exempted from the payment of the wharfage. Issue being joined upon the existence of the custom, it was holden, after argument and long debate, that the issue ought not to be tried by the certificate of the mayor and aldermen, because they are interested in the question; but by a jury.

C. Litt. 74.  
a. 3 Bl.  
Comm.  
334-5.

[In some cases, the certificate of the sheriffs of *London* shall be a final trial: as, if the issue be, whether the defendant be a citizen of *London*, or a foreigner, in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of privilege of the university, when the chancellor claims cognizance of the cause, because one of the parties is a privileged person. In this case, the charters, confirmed by act of parliament, direct the trial of the question, whether a privileged person or no, to be determined by the certificate and noti-



fiction of the chancellour under seal; to which it hath also been usual to add an *affidavit* of the fact: but, if the parties be at issue between themselves, whether *A.* is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellour's certificate: because the charters direct only that the privilege be allowed on the chancellour's certificate, when the claim of cognizance is made by him, and not where the defendant himself pleads the privilege: so that this must be left to the ordinary course of determination.

If, in order to avoid an outlawry, or the like, it was alleged, that the defendant was in prison, *ultra mare*, at *Bordeaux*, or, in the service of the mayor of *Bordeaux*, this should have been tried by the certificate of the mayor; and the like of the captain of *Calais*. But, when this was law, those towns were under the dominion of the crown of *England*. And, therefore, by a parity of reason, it should now hold, that in similar cases, arising at *Jamaica* or *Barbadoes*, the trial should be by certificate from the governor of those islands.

The certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons.

If there be any question respecting the practice of the courts in *Wales*, it shall be determined by certificate from the judges there.

So, the courts will inform themselves whether a highway (indicted) is in repair, by certificate from the justices of the peace.]

If a question arise, whether an original writ ought to bear *teste* on the day it was bespoken at the curitor's office, or upon the day it was sealed, it is to be tried by the certificate of the principal and assistants of the curitor's office.

9 Rep. 31.  
Co. Litt. 74.  
a. 3 Bl.  
Comm. 334.

Dy. 176-7.

Broughton  
v. Randall.  
Cro. Eliz.  
503.

Rex v.  
Mawbey.  
6 Term.  
Rep. 619.

1 P. Wms.  
438. Price  
v. The Hun-  
dred of  
Chewton.

## (D) Of a Trial by a Jury.

IT is in the general true, that every question of fact arising in a cause is to be tried by a jury.

And in divers cases wherein a question of fact may be otherwise tried, it is, as under the foregoing heads has been shewn, in the discretion of the court to send it to be tried by a jury.

If a new offence be created by a statute, and the statute be silent as to the manner of its being tried, the trial thereof is to be by a jury; this manner of trial being agreeable to *magna charta*.

As the question, whether there ought to be a common council in a corporation, consisting of a certain number of persons, must always depend upon a question of fact, namely, whether there have been an usage in the corporation to have such common council, it is a proper question for the determination of a jury.

If a question do not depend upon an act alone, but upon an act as being coupled with a certain intent, the intent as well as the act

Bro. Trial,  
pl. 60.  
Bro. Appeal,  
pl. 47.

7 Mod. 59.  
Reg v.  
Sturmeys.

Sayer, 37.  
Rex v. The  
Mayor and  
Burgesses of  
Notting-  
ham.

1 H. H. P.  
C. 229.

must be tried by a jury: because the intent is in such case the material thing, and the jury must judge thereof in the best manner they are able from the circumstances which attended the act.

Bro. Issue,  
pl. 45.

If the issue be, whether a tenant chased his beasts from a manor, after the lord who came to distrain had seen them upon the manor, with an intent to prevent them from being distrained, the intent must be tried by a jury.

Bro. Issue,  
pl. 22.  
1 H. H. P.  
C. 229.

If the issue in an information be, whether the intent of the defendant was to carry wool, which had been by him put on board a ship, to *Calais*, the intent must be tried by a jury.

Hob. 217.  
Crookhay v.  
Woodward.  
Hob. 93.  
5 Rep. 108.

If an agreement be, that a certain fact shall be proved, it must be proved to a jury; this being the legal way of proving a matter of fact.

Sid. 313. Cro. Jac. 381.

Hob. 217.  
Crookhay v.  
Woodward.  
5 Rep. 108.

But, if a particular manner of proving a certain fact have been agreed upon, it must be proved in the manner agreed upon.

Sid. 313. Hob. 93.

3 Lev. 241.  
Beayne v.  
Beale.

If an agreement be, that a certain fact shall be proved before *J. S.* it is to be proved by witnesses to be examined by *J. S.*

Cro. Ja.  
381.  
Sid. 313.

And although an agreement be in general terms, that a certain fact shall be proved; yet, if it appear clearly from any circumstance attending the agreement, that the parties did not intend a proof to a jury, the fact may be otherways proved.

Cro. Ja. 381.  
Gold v.  
Death.

If an agreement be, that a certain fact shall be proved in two days, it is not necessary that it should be proved to a jury; for, as a trial by a jury can never be had within so short a space of time as two days, such trial could not have been intended.

Lutw. 665.  
Ladd v.  
Garrod.

The condition of a bond dated the 23d day of *August* was, that the obligor should pay to the obligee ten shillings, for every twenty shillings which the obligee should by sufficient proof make appear that *J. S.* was indebted to him; and that one half of the same should be paid on or before the 25th day of *November* then next ensuing. An action of debt being brought upon the bond, the defendant pleaded, that the plaintiff did not make it appear by sufficient proof, that *J. S.* was indebted to him in the sum of twenty shillings. The plaintiff replied, that before the said 25th day of *November* he and *J. S.* settled an account, by which *J. S.* acknowledged himself to be indebted to the plaintiff in the sum of 310*l.* Upon a demurrer to the replication it was insisted, that the proof of the debt ought to have been made to a jury: but it was holden, that such proof could not have been intended; because a trial by a jury could not have been had before the time limited for the payment of the money must have expired.

If it be necessary that a fact should be proved to a jury, it is not necessary that it should be proved in a previous action.

Moor, 845.  
Griffin's  
case.  
2 Leon. 215.

A promise was made by *J. S.* to pay *J. N.* three pounds, upon his proving that a certain cock won his battle. An action being brought

brought for the money, J. S. pleaded that this had not been proved. The plea was holden to be bad. And by the court—It was not necessary to prove this before the bringing of the present action; for it may be proved at the trial thereof.

A penalty was given by a statute, upon its being proved by two witnesses, that a certain thing thereby prohibited had been done. In an action of debt for the penalty, the question was, Whether it were necessary to prove the offence by two witnesses in a previous action, before an action could be brought upon the statute. It was holden not to be necessary; for that this may be proved in the action upon the statute.

Cro. Ja.  
183.  
Aldred v.  
Mathew.

### (E) Of a Trial at Bar.

BY the statute of second *Westminster c. 30.* trials at bar, which were before had in all causes, are confined to such causes, as by reason of the greatness and variety of the matters in question require a more solemn examination.

A trial at bar cannot be had without the leave of the court, although both parties desire to have a cause tried at bar.

2 Lill. Abr.  
741.  
Str. 696.

It is laid down in one book, that unless it appear, that the matter in question is of considerable value, and that some difficult question will probably arise at the trial of the cause, the court ought not to grant a trial at bar.

1 Barnard.  
141.  
Goodright  
v. Wood.

The estate in question was of the value of 3000 *l.* a year; yet the court refused to let an action of ejectment be tried at bar; because, as the lessor of the plaintiff claimed under the defendant, it did not appear, that any thing more would be necessary than to prove the execution of a conveyance.

Salk. 648.  
Lord Sand-  
wich's case.

But it is in other books laid down, that the granting of a trial at bar is discretionary in the court.

2 Lill. Abr.  
741.  
Str. 696. [1 Term Rep. 363.]

Trials at bar were granted in two modern cases, although it did not appear, that any difficult question would arise at the trial of either of the causes; because the matters in question were of great value.

Str. 52. 479.

In another case the court granted a trial at bar at the instance of the defendant; because the plaintiff had laid his damages at 50,000 *l.*, although it did not appear, that any difficult questions would arise at the trial of the cause.

1 Barnard.  
320.  
Lord Hills-  
borough v.  
Jeffries.

And in another case the court granted a trial at bar, although the matter in question was very inconsiderable; because it appeared, that the examination would be difficult.

Str. 644.  
Rex v.  
Johnson.

It has been holden, that, in order to induce the court to grant a trial at bar, the particular value or difficulty of the cause must be shewn; for that it is not enough to swear generally to value or difficulty.

1 Barnard.  
141.  
Goodright  
v. Wood.

It was sworn in order to obtain a trial at bar, that the examination was expected to be long and difficult, and that the matter in question was of great value. A trial at bar was refused. And by the court—It is very easy to allege generally, that there is

Sayer, 79.  
Rex v.  
Burgesses of  
Caumar-  
then.

value in a cause, or that the examination is expected to be long and difficult: but the court ought not to grant a trial at bar, unless the particular value or difficulty be shewn; because trials at bar are very expensive, and the granting of many would prevent the court from dispatching the business of other suitors.

MS. Rep.  
Whitaker v.  
Burrough,  
Trin. 4 G. 3.  
in C. B.

It was said by *Pratt*, Ch. J. that the most proper case for granting a trial at bar is, where it is likely that a question of law will arise, and that this will be so complicated with a question of fact, that the whole matter must be determined by the jury under the direction of the court: for that, how difficult soever the question of law which is likely to arise may appear to be, if it be not complicated with a question of fact, there is no necessity to grant a trial at bar; because the question of law may be reserved for the consideration of the court.

Str. 696.  
The case of  
the Borough  
of Christ-  
Church.  
12 Mod. 331.

It is in the general true, that the court will not grant a trial at bar before an issue is joined; because the court cannot judge, before it is known what the issue is, of the propriety of trying it at bar.

Roe v. Doe,  
on the de-  
mise of  
Cholmond-  
ly.  
Barn. 455.

But in an action of ejectment the court will grant a trial at bar before issue is joined: otherwise it would generally be in the defendant's power to prevent the plaintiff from moving for a trial at bar; issue being seldom joined in such action, until the opportunity of moving for a trial at bar is past.

Sayer, 155.  
Anon.

A motion being made for a trial at bar, before issue was joined in the action, the court refused to make a rule to shew cause. And by *Ryder*, Ch. J.—It is contrary to the practice of the court to grant a trial at bar in any action, except an action of ejectment, before issue is joined.

Salk. 644.  
2 Lill. Abr.  
741.  
Str. 856.  
[The court  
may order

If the *venue* in an action be laid in *London*, the court cannot order it to be tried at bar; because the doing of this would be contrary to a charter, by which the citizens of *London* are exempted from serving as jurors out of the city of *London*.

it in this case, if the jurors consent to waive their privilege as citizens, 2 Willf. 136., or the parties consent to have the cause tried by a Middlesex jury. Dougl. 438.]

2 Lill. Abr.  
750.

And it is said, that if the *venue* in an action be laid in *Bristol*, the court cannot, for the same reason, order it to be tried at bar.

2 Roll. Abr.  
629.  
Fitz. N. B.  
241.

If a civil cause be carried on in the name of the king it must always be tried at bar, unless there be a special warrant for granting a writ of *nisi prius*; because the statute of *nisi prius* does not extend to the king.

Bro. Nisi  
Prius, pl.  
35.  
2 Inst. 424.  
Salk. 651.

The Attorney General may pray a trial at bar in any civil cause wherein the king is interested; for, as the statute of *nisi prius* does not extend to him, the king has a right to try every civil cause in which he is interested at bar.

Salk. 625.  
Ld. Bella-  
mont's case.

A trial at bar was granted at the prayer of the Attorney General in an action against the governor of *New York*, for something done by him as governor; because the action was defended at the expence of the king.

The Attorney General cannot prevent the trial of a civil cause in which the king is interested at bar; for although he may, if the king be interested in a civil cause, always pray a trial at bar, it does by no means follow that he should have a power to deprive a subject of the right of trying a cause at bar, which is proper to be tried there.

Salk. 651.  
Sir Samuel  
Astley's case.

The court will not in the case of an indictment or information grant a trial at bar at the prayer of the Attorney General, unless the prosecution be carried on at the expence of the crown; for, if the prosecution be carried on at the expence of a subject, the king is not to be considered as concerned in point of interest, notwithstanding the prosecution is carried on in his name.

1 Ventr. 74.  
Anon.

The Attorney General prayed, that an information for perjury filed by him *ex officio* might be tried at bar: but the court refused to grant such trial; because he did not allege, that the prosecution was carried on at the expence of the crown. And by the court—As this does not appear to be the case, the usual requisites for a trial at bar must be laid before the court by affidavit. The Attorney General, having afterwards received orders from the king to prosecute, did at another day again pray a trial at bar; which was granted.

Str. 816.  
Rex v.  
Hales.

The court of King's Bench may grant a trial at bar in an information for a misdemeanour at the prayer of the defendant.

Str. 52.  
Rex v. Foley.

A person of good character being apprehended by a hundred for a robbery, and there being reason to suspect, that the prosecution would be carried on with great rigour, for the sake of discharging the hundred by his conviction, a trial at bar was moved for. It was not granted in this case, because the motion was made before a bill of indictment was found: but it was said by Holt, Ch. J., that it had been usual to grant a trial at bar in an indictment at the prayer of the defendant.

12 Mod.  
331.  
Rex v.  
Thompson.

The court of King's Bench may grant a *habeas corpus* for bringing a felon to be tried at bar, although the felony was not committed in the county of *Middlesex*; if it appear, that there will not be a gaol delivery at the usual time in the county in which the felony was committed.

2 Lill. Abr.  
746.

It is said, that an action of debt for not setting out tithes being brought by Sir William Morton, one of the justices of the court of Common Pleas, a trial at bar was moved for, which was granted without any affidavit. And by the court—If one of the judges or a master in Chancery be a party, the cause, however small the value of the matter in question is, may at the prayer of such party be tried at bar.

1 Sid. 407.  
Morton v.  
Hopkins.

In another case it is said, that a trial at bar is never refused, if it be prayed by an officer of the court, or a gentleman at the bar, who is a party to the suit.

Salk. 651.  
Sir Samuel  
Astley's case

But it is doubtful, whether either of these cases be at this day law; for in a very late case, in which a trial at bar was moved for by the defendant a serjeant at law, his pretension to a trial at bar on account of being a serjeant at law was not much relied upon, and a trial at bar was granted upon another ground.

MS. Rep.  
Whitaker v.  
Burrough.  
Trin.  
4 C. 3. in  
C. B.

12 Mod.. The court may grant a trial at bar at the instance of a person  
318. Anon. who sues *in formâ pauperis*.

Salk. 648. A trial at bar being moved for by the defendant, it was refused,  
Anon. because the plaintiff was poor; unless the defendant would consent  
[Vide Doug. to take *nisi prius* costs, in case he should obtain a verdict.  
437-8. acc.]

12 Mod. The court will not grant a trial at bar in an action of ejectment;  
318. Sher- unless a plaintiff sufficient to answer for costs be named.  
win v. Sir  
Thomas Clarges.

1 Vent. 64. A trial at bar was refused, because the party moving for it had  
Lady Bal- not paid the costs of a former trial, at which there was a verdict  
tinglafs's against her.  
case.

Rep. of Pr. A motion being made, that a cause might be tried at bar in the  
in C. B. 66. same term it was moved for, upon a suggestion that the defendant  
Edwards v. would the next term be entitled to privilege, it was objected, that  
The Earl of it had not been usual to grant a trial at bar in the term it was  
Warwick. moved for (a). The court doubted, and ordered precedents to be  
[(a) 2 Salk. looked into: but the defendant agreeing afterwards to waive his pri-  
649.] vilege, a rule was made for a trial at bar in the next term.

2 Lill. Abr. It is a general rule not to grant a trial at bar in an issuable term,  
712 [1 H. lest the other business of the court should on account of such trial  
Bl. 206.] be postponed.

1 Barnard. But, upon the particular circumstances of a case, the court will  
370. 2 Lill. grant a trial at bar in an issuable term.  
Abr. 742.

2 Lill. Abr. By an ancient rule of all the courts, every cause to be tried at  
742. bar is to be tried at least fourteen days before the end of a term,  
{ that the courts may be at liberty towards the end of the term to  
proceed upon matters of law, which are the more proper business  
of the courts.

### (F) Of a Trial at *Nisi Prius*.

THE writ of *nisi prius* is so called from the words, *nisi prius talis et talis venerint*, which are therein contained.

This writ is given by the statute of second *Westminster*, c. 30. for the sake of delivering parties from the great trouble and expense of trying their causes at bar.

Bro. Nisi Prius, pl. 1. The writ of *nisi prius* ought not to be issued before the *venire facias* is returned; for until this is returned the name of the jurors are not of record.  
pl. 9.

Bro. Nisi Prius, pl. 9. But a writ of *nisi prius* issued upon the day of the return of the *venire facias* was holden to be well enough; although it did not appear that the *venire facias* was in fact returned before the writ of *nisi prius* was issued.

It is in the general true, that the defendant in an action is not entitled to a writ of *nisi prius*, unless the plaintiff have made default in proceeding to trial.

Bro. Nisi Prius, pl. 40. But in an action of replevin or *quare impedit*, in both which actions the defendant is an actor, he may sue out a writ of *nisi prius*, although the plaintiff have not made default in proceeding to trial.

It has been holden, that the defendant in a writ of error may sue out a writ of *nisi prius*, in case issue be joined upon an error in fact, although the plaintiff have not made default in proceeding to trial: for that, if this could not be done, the effect of the judgment in the original action might be delayed by the plaintiff in error.

2 Lev. 5.  
Dennis v.  
Dennis.

If both parties desire it, a cause which is proper to be tried at bar may be tried at *nisi prius*; for in that part of the statute, describing causes which may be tried at bar, it is declared, that if both parties desire it any one of these may be tried at *nisi prius*.

An action of appeal may be tried at *nisi prius*.

Bro. Nisi  
Prius, pl. 19. 2 Hawk. Pl. C. c. 42. § 2.

If the plaintiff in a country cause have neglected to try it at the next assizes after issue was joined, the defendant may sue out a writ of *nisi prius* with proviso.

Gilb. Hist.  
C. P. 91.

It is said, that the defendant in a town cause cannot sue out a writ of *nisi prius* with proviso; unless the plaintiff have neglected to proceed to trial for the space of one whole term after issue was joined.

Ibid.

But it has been holden, that the defendant in a town cause may sue out a writ of *nisi prius* with proviso, as soon as the plaintiff has been guilty of one default in proceeding to trial after issue was joined.

Rep. of Pr.  
in C. B. 101.  
Williams v.  
Jones.

The defendant may sue out a writ of *nisi prius* with proviso in an action of appeal; whether it be brought for a capital offence or for one that is not so.

2 Hawk. Pl.  
C. c. 42.

And it is said in one case, that the defendant in an indictment may sue out a writ of *nisi prius* with proviso.

1 Sid. 316.  
Anon.

But it seems to be the better opinion, that the defendant cannot, in any cause either civil or criminal in which the king is a party, sue out a writ of *nisi prius* with proviso; because a default cannot be imputed to the king.

1 Vent. 315.  
Anon.  
2 Hawk. Pl.  
C. c. 42.

And it has been doubted, whether the defendant in an information *qui tam* can sue out a writ of *nisi prius* with proviso; because the king is *quasi* a party.

2 Leon. 110.  
Knevit v.  
Taylor.

If two writs of *nisi prius*, with proviso, one of which was sued out by the plaintiff, the other by the defendant, come to the hands of the sheriff, it is in his option to return which he pleases.

Bro. Proces,  
pl. 56.  
2 Roll. Abr.  
666.

## (G) Of Notice of Trial.

IT is in one case said, that notice of trial, which must be in writing, cannot be given in the country.

Goodright  
v. Hoblin,  
Barnes, 298.

But in a subsequent case the following distinction is taken, that if notice of trial be given with the issue, it must be given in town, because the issue can only be delivered in town: but that if notice of trial be not given with the issue, it may be given in the country.

Tashburne  
v. Havelock,  
Barnes, 306.

Eight days notice of trial are sufficient, if the cause is to be tried in *London* or *Westminster*, and the defendant do not reside above forty miles from these cities respectively.

By the 14 G. 2. c. 17. §4. it is enacted, "That no indictment, information, or cause whatsoever, shall be tried before any judge of assize or *nisi prius*, or at any sitting in *London* or *Westminster*, where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given at least ten days before such intended trial."

Bowler v.  
Jenkin,  
Barnes, 305.

Before the making of this statute, the practice of the courts was to give fourteen days notice of trial, if the cause were to be tried in *London* or *Westminster*, and the defendant resided above forty miles from those cities respectively; and it has been holden, that as the words of this statute are not in the negative, namely, that no more than ten days notice shall be given, the practice of the courts, which is the law of the courts, is not taken away; and, consequently, that fourteen days notice are in such case still necessary.

Brind v.  
Torris,  
2 Bl. Rep.  
1205.  
Douglas v.  
Ray,  
4 Term Rep. 552.

[Although the venue be laid in *London*, and the defendant be arrested there, yet, if his residence be above forty miles from town, the notice required by the statute and the practice of the court must be given.

Per Ash-  
hurst, J.  
4 Term Rep.  
519-20.

But, if one of several defendants reside within forty miles of *London*, so long a notice is not necessary.

Frampton  
v. Payne,  
1 H. Bl. 65.

Where issue is joined early enough in a term, notice of trial must be given in the same term.]

3 Lill. Abr.  
741.

Notice cannot be given of a trial at bar; until the day appointed for the trial be entered in the book of the clerk of the papers.

By the ancient rules of the courts of King's Bench and Common Pleas, a whole term's notice is necessary to be given, before there can be any proceeding in a cause, wherein there has been no proceeding for the space of four terms.

Some doubts having arisen concerning the construction of these rules; it is by a rule of the court of Common Pleas of *Easter*, 13 G. 2. ordered, "That in every cause, wherein there has been no proceeding for four terms, exclusive of the term in which the last proceeding was, the party who desires to proceed again shall give a term's notice to the other party of such proceeding; that such notice shall be given before the *essoign-day* of the fifth or other subsequent term; that a judge's summons, if no order has been made thereupon, shall not be deemed a proceeding; but that notice of trial, although it was afterwards countermanded, shall be deemed a proceeding within the meaning of this rule."

1 Sid. 92.  
Powis's case.

It has been holden, that although a cause have been at issue more than four terms, if the trial have been delayed by reason of privilege

lege



lege of parliament, it is not necessary to give a whole term's notice of trial.

It has been also holden, that if the trial of a cause, which has been at issue above four terms, have been delayed part of the time by an injunction from a court of equity, it is not necessary to give a whole term's notice of trial.

*Ibid.*  
[Hayley v. Riley, Dougl. 71-2.]

If notice of trial have been countermanded, it cannot afterwards be continued : but new notice must be given.

Barn. 301.  
Smith v. Hoff.

If the name of the cause be not inserted in the notice of trial, the notice is not good ; and this defect is not cured by inserting the name in the continuance of the notice.

Barn. 297.  
Jacob v. Marth.

Notice of trial can be continued only once ; for the court will not suffer this, which amounts to giving short notice of trial, to be done a second time.

Barn. 292.  
Boyes v. Twiss.

[2 Str. 1119. Green v. Giffard. S.P.]

But, if the full time required for new notice of trial be given in a second notice of continuance, this is good as a new notice of trial ; for the court will reject the words of continuance as surplusage.

*Ibid.*

If a cause be made a remanet *pro defectu juratorum*, new notice of trial must be given.

2 Lill. Abr. 744.

It is said, that if a cause were made a remanet by the judge, because there was not time to try it, there is no necessity to give a new notice of trial ; for that the defendant is in such case bound at his peril to attend until the cause is tried.

2 Lill. Abr. 745.  
[Tidd's Pr. 492.]

[Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, &c. without having had notice of trial. Nor will he be allowed the costs of such attendance and preparation, though he obtain judgment as in case of a nonsuit, on account of the plaintiff's not proceeding to trial.]

Isfield v. Weeks.  
1 H. Bl. 222.

If the defendant proceed to trial of a cause under a writ of *nisi prius* with proviso, he is liable to the same rules, as to the giving notice of trial, as the plaintiff would have been.

Rep. of Pr. in C. P. 125.  
Swall v. Leaver.

It has been holden, that although the defendant, who has removed an indictment, be obliged by the recognizance entered into upon removing it to try the issue which shall be joined at the next assize, he must give notice of trial ; and that entering notice in the office-book is not sufficient notice.

Sayer, 90.  
Rex v. Furrer.

Notice of countermanding a trial, which must be in writing, may be given in the country.

Barn. 298.  
[Goodright v. Hoblin. Tidd's Pr. 491.]

It was heretofore sufficient to give two days notice of countermanding the trial of a cause, which was to be tried at a sitting in London or Westminster.

Rule of K. B. Mich. 4 Ann.

It was also heretofore sufficient to give two days notice of countermanding the trial of a cause, which was to be tried at an assize, unless the notice were delivered to the agent in town ; in which case four days notice was necessary.

Barn. 305.  
Stafford v. Thompson.

By the 14 G. 2. c. 17. § 5. it is enacted, "That where any party shall have given notice of the trial of any cause, before any judge of assize or *nisi prius*, or at any sitting in *London* or *Westminster*, where the defendant lives above forty miles from the said cities respectively, and shall not afterwards countermand the same in writing six days at the least before such intended trial, every such party shall be obliged to pay the like costs and charges, as if such notice of trial had not been countermanded."

Reg. gen.  
3 Term Rep.  
660. Tidd's  
Pr. 470.

[Where short notice of trial is to be accepted in country causes, it is the rule of the court of King's Bench, that such notice shall be given at least four days before the commission-day, one day exclusive, and the other day inclusive. But in town causes, two days notice seems sufficient in such case; but it is usual to give as much more as the time will admit. And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given.]

### (H) Of putting off a Trial.

1 Ventr. 33.  
Rex v. Ben-  
ton.

THE trial of an indictment was proceeded to, notwithstanding an order under the sign manual to the clerk of the crown to enter a *cesser* of prosecution. And by the court—We are not to delay a cause by reason of the great or little seal.

MS. Rep.  
Rex v.  
Stuart. Trin.  
33 G. 2.

A motion being made, at the instance of the defendant, to put off the trial of an indictment for a misdemeanour on account of the absence of a material witness, it was insisted, that the trial ought not to be put off, because the prosecution was carried on at the expence of the crown: but the court without hesitation made a rule for putting it off.

Salk. 646.  
Salisbury v.  
Proflor.  
Salk. 649.  
[22.]

In an action by an administrator, a motion was made to put off the trial, until a suit in a spiritual court concerning the right of the plaintiff to be administrator should be determined. The motion was refused. And by the court—A court of common law cannot take notice of a proceeding in an ecclesiastical court.

1 Barnard,  
44. Smith  
v. Lidcote.

A motion was made to put off a trial; because the costs for not proceeding to trial of the same cause had not been paid. At first the court said, that the application ought to have been for an attachment for non-payment of the costs: but it appearing that an attachment would answer no purpose, the plaintiff being already in custody, a rule was made for putting off the trial.

It is not usual to make a rule for putting off the trial of a cause longer than to the next term, or the next assize, after the rule for putting it off is made.

Rep. of Pr.  
in C. P. 45.  
219.

But upon the particular circumstances of a case, the court will make a rule for putting off the trial of a cause to the second term after the rule for putting it off is made.

Rep. of Pr.  
in C. P. 99.  
[Imp. K. B.  
313.]

It is a general rule, that a motion for putting off a trial must be made two days at the least, before the day on which the cause stands for trial.

But upon the particular circumstances of a case the court will dispense with this rule. After a cause had been called on and made a remanet by consent, a motion was made for putting off the trial on account of the absence of a material witness. A rule for putting it off was made; because it appeared, that it did not come to the knowledge of the defendant, that this witness was a material one, time enough to make the motion for putting off the trial two days, before the day on which the cause was to have been tried.

Barn. 452.  
Hart v.  
Whitlocke.

A motion was made to put off the trial of a cause upon the affidavit of a third person, that J. S. an absent person was a material witness for the defendant. No rule was made. And by the court—The affidavit, that an absent witness is a material one, must, in order to obtain a rule for putting off a trial, be made by the defendant himself.

Barn. 437.  
Carter v.  
Uppington.

The defendant's attorney, in order to obtain a rule for putting off a trial made affidavit that J. S. was a material witness for the defendant; and that he was beyond *York*, and could not be in *London* time enough to give evidence at the trial. No rule was granted. And by the court—It is settled, that a trial ought not to be put off on account of the absence of a witness, unless the defendant himself make an affidavit, that the witness is a material one.

Rep. of Pr.  
in C. P. 96.  
Price v.  
Warren,  
Hil. 7 G. 2.

But it appears from a subsequent case, that it is not always necessary, in order to obtain a rule for putting off a trial on account of the absence of a witness, that the defendant himself should make affidavit that the witness is a material one. Upon shewing cause, against a rule for putting off a trial on account of the absence of a witness, it was objected, that the affidavit of the witness being a material one, was not made by the defendant himself. The rule was made absolute. And by the court—There may be a case, wherein a third person can swear that a witness is a material one, and the defendant himself cannot; as if a factor sell goods for his principal, and employ a porter to deliver them, the factor in this case knows the porter to be a material witness, but the defendant does not.

Barn. 448.  
Day v.  
Samson.

In order to put off a trial on account of the absence of a witness, the affidavit must be positive that the witness is a material one; for the court will never delay a plaintiff without apparent cause, and nothing is so easy as for a defendant to swear, that he believes a witness to be a material one.

Rep. of Pr.  
in C. P. 81.  
Welberry v.  
Lifter.

If it appear that the witness, whose absence is made the ground of a motion for putting off a trial, was not absent at the time notice of trial was given, the court will not make a rule for putting off the trial.

Barn. 442.  
Bourne v.  
Church.

It is in the general required, that the affidavit, for obtaining a rule to put off a trial on account of the absence of a witness, should shew at what time the witness is expected to return.

But it is said, that it is not always necessary to shew this; for that in some cases, as if the witness be gone in a ship belonging to a fleet in the king's service, it is impossible to form a judgment

1 Barnard.  
39. Anon.

ment at what time he will return, unless the person who makes the affidavit know what instructions were given to the commander of the fleet.

Tidd's Pr.  
500. 3 Burr.  
1514.  
1 Bl. Rep.  
436.

[Where there is no cause of suspicion, the affidavit to put off the trial on account of the absence of a material witness is sufficient in the common form; namely, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured, without effect, to get him *subpœna'd*, but that he is in hopes of procuring his future attendance. But, if there be any cause of suspicion, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the party applying has not been guilty of any laches or neglect; and thirdly, that he is in reasonable expectation of being able to procure his attendance at some future time.]

Barn. 437.  
Roberts v.  
Downes.

A motion was made to put off a trial, because the witness who could prove a set-off was absent; but the court was of opinion, that, as this is a collateral defence, and there is no instance in which a trial has in such case been put off, the trial ought not to be put off.

Say. Rep.  
63. 1 Burr.  
512. 4 Term  
Rep. 285.

[The illness of the defendant's attorney, and the publication of a paper with intent to influence the jury, have been admitted as causes for putting off the trial.]

### (I) At what Time an Indictment may be tried before Justices of *Oyer and Terminer*.

Keilw. 159. **I**T has been holden by all the judges of *England*, that justices of *oyer and terminer* cannot proceed to the trial of an indictment upon the day that issue is joined: but that justices of gaol delivery may.

4 Inst. 164.  
2 Inst. 568.  
2 Hawk. Pl.  
C. c. 41.  
§ 4.  
The reason given for the difference is, that as justices of gaol delivery, some time before their coming, issue a general precept to the sheriff, for returning before them at the day of their session twenty-four out of every hundred, to do those things which shall be enjoined them on the part of the king, it is presumed, that there are always enough of those returned under the general precept in court, out of whom the sheriff, an award being for that purpose made by the court, may return a jury immediately under the general precept.

2 Hawk.  
Pl. Cl. *ibid*.  
This reason does not appear to be conclusive; for a general precept is issued, at the same distance of time before their holding of a session, and in the very same terms, by justices of *oyer and terminer*.

4 Inst. 464.  
2 Inst. 568.  
9 Rep. 118.  
2 Hawk.  
Pl. C. *ubi supra*.  
But, whether the difference depends upon *usage*, or upon whatsoever it does depend, the law seems to be settled, that justices of *oyer and terminer* cannot award a jury for the trial of an indictment, to be returned immediately out of those returned under the general precept; but that they must issue a *venire facias* for the returning of a jury.

It was in one case insisted, that justices of gaol delivery have not a power to award a jury, to be returned immediately for the trial of an indictment, unless the party indicted be in prison: but the opinion of the court was, that such justices can as well do this where the party is not in prison as where he is.

Cro. Car.  
340. Rex v.  
Chapman.

It is said by *Coke*, Ch. J. that, although justices of *oyer and terminer* cannot award a jury, to be returned immediately for the trial of an indictment out of those returned under the general precept, they have a power in all cases to award a *venire facias* returnable immediately, and he cites divers old cases, in which such power was in fact exercised.

4 Inst. 164.  
2 Inst. 568.

But it seems to be the better opinion, that justices of *oyer and terminer* cannot award a *venire facias* returnable in less than fifteen days.

In one case a *venire facias* returnable immediately, which was awarded by justices of *oyer and terminer* for the trial of an indictment for barratry, was holden to be good; because it had been awarded with the consent of the party indicted; which shews, that without such consent it would not have been good.

1 Sid. 99.  
Rex v.  
Sadler.

And it may be inferred from divers other cases, that justices of *oyer and terminer* cannot award a *venire facias* returnable in less than fifteen days for the trial of an indictment.

2 Roll. Abr.  
626.  
Cro. Car.  
315. 448.

If an indictment be found in a county wherein the court of King's Bench sits, a *venire facias*, returnable immediately, may be awarded for the trial of the indictment. But, if an indictment for a misdemeanour, found in a county wherein the court of King's Bench does not sit, be removed into that court, a *venire facias* returnable in less than fifteen days cannot be awarded for the trial of the indictment.

9 Rep. 118.  
Ld. San-  
char's case.

## (K) Of the Manner of trying where more than one Issue is to be tried.

**I**F in an action against two, one of the defendants plead a plea in abatement, and the other a plea which goes to the action, and issues be joined upon both pleas, the issue upon the plea in abatement ought first to be tried; because, if this be found against the plaintiff, the whole action abates.

1 Inst. 125.  
2 Roll. Abr.  
628. pl. 7.

If in a personal action against two, one of the defendants plead a plea which goes to the action, and the other a plea which extends only to himself, and issues be joined upon both pleas, the issue upon the former plea ought to be first tried; because, if this be found against the plaintiff, the other defendant may take advantage of the verdict, in which case there will be an end of the action.

1 Inst. 125.  
Bro. Trial,  
pl. 1. pl. 48.  
2 Roll. Abr.  
627. pl. 1.

If in an action of trespass against two, one of the defendants plead a release, and the other a plea which extends only to himself, as not guilty, or a justification, and issues be joined upon both pleas, the issue upon the former plea shall be first tried; because

1 Inst. 125.  
2 Roll. Abr.  
628. pl. 5.

cause if this be found against the plaintiff, it makes an end of the action; the discharge of one defendant being in such case a discharge of both.

Bro. Trial,  
pl. 48.

If a personal action be brought against two, and one of the defendants plead a plea which extends to himself only upon one day, and the other a plea which extends to himself only upon a subsequent day, and issues be joined upon both pleas, the issue upon the former plea ought to be first tried; because it shall be intended to have been first pleaded.

2 Inst. 125.  
1 Roll. Abr.  
628. pl. 9.

If a real action be brought by *J. S.* as heir to his father against two, and one of the tenants plead a plea which extends only to himself, and the other a plea which goes to the action, as that the demandant is a bastard, and issues be joined upon both pleas, it is not material which of the issues is first tried; for, although that which goes to the action be first tried and found against the demandant, the other shall nevertheless be tried; because the demandant may recover that part of the land, of which the other tenant is in the possession.

1 Inst. 125.

If in an action an issue be joined as to part, and there be a demurrer as to the residue, it is in the discretion of the court, to order the issue to be first tried, or the demurrer to be first argued.

Sayer, 131.  
Kemp v.  
Mackerill.

At a trial at bar, in which eleven issues directed by the court of Chancery were to be tried, it was moved, that the evidence as to the different issues might be gone through separately, and the case of *Lord Thanet v. Sir Edward Snatchbull* was cited; in which divers issues directed by the court of Chancery had been tried in divers terms. This was consented to by the other side. And by the court—The doing of this is quite reasonable: for if the evidence be not gone through separately, it must in summing up be separated by the judge, otherwise the jury will not be able to find a proper verdict.

## (L) Of granting a new Trial.

### 1. In the General.

Sty. 462.  
Wood v.  
Gunston.

THE case of *Wood v. Gunston*, which was in the year 1655, is the first case reported in the books, wherein a new trial was granted.

1 P. Wms.  
207. Rex v.  
the Corp. of  
Bewdley.

But it is said, that it ought not from thence to be concluded, that this was the first instance of granting a new trial; for that the silence of reporters as to this matter may be imputed to its not having been formerly the practice to report what was done by courts upon motions.

Salk. 648.  
Argent v.  
Darrell. [In  
11 Mod. 119.  
it is said  
that Lord

It is said by *Holt*, Ch. J. that the granting of new trials must have been much more ancient than the case of *Wood v. Gunston*; because it was long before this case a good cause of challenge to a juror, that he had before been a juror in the same cause.

*Holt* cited a case in *Edward 3d.*'s time, where a new trial was granted, because a great lord concerned in the cause sat upon the bench at the trial.]

But

But it is said in another case; that what is said by *Holt*, Ch. J. in the case of *Argent v. Darrel* is not of much weight; for that the challenge, because a man had before been a juror in the same cause, might have been where a *venire facias de novo* had been awarded. Str. 995. *Rex v. Bell*.

[If an issue be directed by a court of equity, the motion for a new trial must be made before that jurisdiction. But in that case, it is not, as at law, to set aside the verdict; for a court of equity frequently grants a new trial without setting aside the verdict; which is of great consequence to the parties; for then it may be given in evidence, though not conclusive; either party being at liberty to shew on what grounds it was obtained.] Vez. 28-9.

The proper time of moving for a new trial, if the cause were tried in term, is within the first four days after the day upon which it was tried; if it were tried in a vacation, within the first four days of the next term: because judgment may be entered up after such four days are respectively past (*a*). [(a) This rule holds in criminal, as well as civil, cases: though in either, if it

appear to the court at any time before judgment, that injustice has been done by the verdict, they will interpose, and grant a new trial. *Rex v. Holt*, 5 Term Rep. 436. *Rex v. Gough*, Dougl. 797. *Birt v. Barlow*, *Id.* 171.]

But it has been holden, that if judgment have not been in fact entered up, a motion may be made for a new trial after the day upon which it might have been entered up is past. Str. 995. *Gilman v. Smith*, Mich. 9 G. 1.

In a later case however it was holden, that a new trial cannot be moved for after the day on which judgment might have been entered up is past, although it have not been in fact entered up; unless the matter, upon which the motion is founded, were not discovered until such day was past. Barnes, 443. *Willis v. Bennet*.

It is in the general true, that a motion for a new trial cannot be made after moving in arrest of judgment. Salk. 647. *Turbeville v. Stamp*.

But, if the matter, upon which the motion for a new trial is founded, were not discovered at the time of moving in arrest of judgment, a motion for a new trial may be made after moving in arrest of judgment. Rep. of Pr. in C. B. 124. *Phillips v. Fowler*.

And if this be not the case, the court will sometimes give leave to move for a new trial after moving in arrest of judgment; because, if there be reason to arrest the judgment, it would be nugatory for the parties to be at the expence of a second trial. [Regularly, the motion for a new trial should precede the motion in

arrest of judgment, 1 Burr. 334.; but the discussion of the latter motion may precede that of the former, for the reason assigned in the text. 6 Term Rep. 627.]

A new trial may be moved for although the verdict be special; for the intention of a special verdict can only be to reserve a question of law for the opinion of the court, in case the verdict shall stand. Bunb. 51. *Namink v. Farwell*.

If due notice of trial were not given, this is a good reason for granting a new trial: but, if a defence were made, the court will not grant a new trial, although due notice of trial was not given; the defect of notice being cured by the defence. Salk. 646. *Thermolin v. Cole*. [4 Term Rep. 552.]

A new

Sayer, 90. A new trial in an indictment was granted; because the defendant had not given due notice of trial.  
Rex v. Fuller.

7 Mod. 54. A new trial cannot be moved for after a nonsuit; the plaintiff  
Hyon v. being out of court.  
Ballard.

Rep. of Pr. But a motion may be to set aside a nonsuit for irregularity, and  
in C. B. 63. if it appear to have been obtained irregularly, the court will make a  
125. rule for a proceeding in the cause, which answers the same purpose  
7 Mod. 54. as granting a new trial.  
[4 Burr. 1985.]

Barnes, 447. It has been holden, that a new trial cannot be moved for in the  
Bond v. court of Common Pleas, in a cause which was tried before a judge  
Palmer. of another court, unless the fact upon which the motion is grounded be verified by affidavit.

MS. Rep. But in a late case the court of Common Pleas made a rule to  
Gulliver v. shew cause, why a new trial should not be granted in a cause which  
Moffit. East. was tried before a judge of another court, although the fact upon  
8 G. 3. which the motion was grounded was not verified by an affidavit.

3 Keb. 351. It is in the general true, that the court will not grant a new  
St. Bar v. trial, unless a report be made of the trial by the judge before whom  
Williams. the cause was tried.

MS. Rep. But, if the judge before whom the cause was tried die before  
Bolton v. he make a report of the trial, the court will receive an account  
Holmes, thereof by affidavit.  
Trin.

30 G. 2. in B. R. [Rex v. Holt, 5 Term Rep. 438.]

[Ca. Temp. The report of the judge before whom the cause was tried is  
Hardw. 23.] conclusive, upon a motion for a new trial, as to every thing which  
passed at the trial.

12 Mod. It is said by Holt, Ch. J. that if in his judgment the matter de-  
336. Anon. serves a re-examination, he should be for granting a new trial, al-  
though it would be contrary to the report of the judge. . .

12 Mod. 1. If there have been a view, the court will not, unless there be  
Anon. some special reason for so doing, grant a new trial: because it is  
to be presumed, that the jury were as much or perhaps more in-  
fluenced by what they observed upon the view, than by the evi-  
dence given in court.

12 Mod. If two persons be defendants in an action, and there be a ver-  
275. dict in favour of one of them, the court will not grant a new  
Bond v. trial at the instance of the other; because the verdict must, if set  
Spark and aside, be set aside as to both; and it would be very unreasonable,  
another. that he in whose favour the verdict is should be a second time in  
Str. 814. jeopardy (a). But, if the defendant, in whose favour the verdict  
[(a) Collier is, consent to the granting of a new trial, the court will grant it,  
v. Morris, provided it be in other respects proper.  
M. 1735.  
Bull. N. P.  
326. Cap.

Crabb's case, 23 G. 2. *ibid.* S. P. Ferne's case, Hil. 27 and 28 Car. 2. *ibid. contra.* So, in an action of trespass and false imprisonment brought in the King's Bench against Mr. Leroux, a magistrate, and two others, who were constables; the two latter were acquitted, and there was a verdict against Leroux for 20*l.* which the court set aside, and they granted a new trial as to him; and upon the second trial there was a verdict in his favour, 6 Term Rep. 625. So, in an indictment for a misdemeanour, where some of the defendants are acquitted, and some convicted, a new trial may be granted as to those convicted. Rex v. Mawbey, 6 Term Rep. 619.]



The court will not grant a new trial, if it be probable that the verdict, in case a different one be found upon the new trial, will be given in evidence in a criminal prosecution.

12 Mod.  
319. Rich-  
ardson v.  
Williams.

It is in the general true, that the court will not grant a new trial upon the merits, without the condition of paying the costs of the former trial.

2 Vern. 75.  
12 Mod.  
370.

But the court will sometimes grant a new trial upon the merits, without the condition of paying the costs of the former trial.

[Where a new trial is granted, and nothing is said in the rule concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first.]

Mason v.  
Skurray,  
Doug. 438.  
S. P. Schul-  
Term Rep. 507.

bred v. Nutt, B. R. M. 23 G. 3.; and Hankey v. Smith, 3

It being discovered, that the jury had drawn lots, in order to determine for which party they should find a verdict; the court granted a new trial, and ordered that the costs of the former trial should abide the event thereof.

Str. 642.  
Hale v. 1  
Cove.  
[Rex v.  
Lord Fitz-  
water,

2 Lev. 139. 1 Freem. 414. S. C. Foster v. Hawden, 2 Lev. 205. Fry v. Hardy, Sir Philips v. Fowler, Barnes, 441. Com. Rep. 525. Pr. Reg. 409. Andr. 383. S. C. S. P. In Parr v. Seames, Barnes, 438., the court would have admitted affidavits of the jurors themselves to substantiate the fact. But in Vassie v. Delaval, 1 Term Rep. 11., the court refused to receive them. *Et vide* Pryor v. Powers, 1 Keb. 811.]

T. Jon. 83.

At the trial of an action of false imprisonment against a justice of the peace it appeared, that the action was commenced within six months after the end of the imprisonment of the plaintiff, but not within six months after the day of his commitment. It was ruled by *Willes*, Ch. J. before whom the cause was tried, that the action was not commenced within the time limited by the 24 G. 2. c. 44. and the plaintiff was nonsuited. A new trial was granted, without the condition of paying the costs of the former trial.

MS. Rep.  
Pickersgill  
v. Palmer,  
Hil. 2 G. 3.  
in C. B.  
[Rice v.  
Shute, 2 Bl.  
Rep. 698.  
S. P.]

Two bills of exchange, drawn by Colonel *Clive* upon the *East India Company*, payable to *Campbell* or order, had been indorsed by *Campbell* to *Ogilby*; but the words *or order* were not added in the indorsement of one of the bills. Both the bills being afterwards indorsed by *Ogilby* to *Edie* and *Lard* and order, an action of *assumpsit* was brought upon them. There being no doubt as to the bill which was indorsed to *Ogilby* or order; the jury found for the plaintiffs as to the count wherein this was declared for. As to another count wherein the bill indorsed to *Ogilby* only was declared for, they found for the defendants; but their verdict as to this count was grounded entirely upon evidence, that by the usage of merchants this bill was not assignable to the plaintiffs, because the words *or order* were not added in the indorsement from *Campbell* to *Ogilby*. Upon a motion for a new trial, Lord *Mansfield* Ch. J. before whom the cause was tried, reported, that he told the jury, that by the general law every indorsement of a bill of exchange would follow the nature of the original bill; and consequently, that if the original bill were payable to *J. S.* and order, an indorsement by *J. S.* to *J. N.* would be a good assignment to

MS. Rep.  
Edie and  
Lard v. The  
East India  
Comp. Trin.  
1 G. 3. in  
K. B.  
[2 Burr.  
1216. 1 Bl.  
Rep. 216.  
S. C.  
Tindal v.  
Brown, 1  
Term. Rep.  
167. S. P.]

*J. N.* and his order, notwithstanding the words *or order* were not added in the indorsement to *J. N.* But that, if they were fully satisfied from the evidence which had been given, that the words *or order* are by the usage of merchants necessary to the enabling of an indorsee to assign a bill of exchange, they ought to find for the defendants as to that bill in the indorsement of which these words were not added. His lordship added, that at the trial of the cause he was of opinion, that evidence of the usage of merchants was in this case admissible; but that, having since looked into the cases upon the point, and considered the matter with great attention, he is now clearly of opinion, that he ought not to have admitted such evidence, and consequently that, as the verdict upon that count which is found for the defendants was entirely grounded upon evidence of the usage of merchants, a new trial ought to be granted. The other justices being of the same opinion, the remaining consideration was, whether the new trial should be granted upon the usual condition of paying the costs of the former trial. It was holden, that no costs should be paid. And by the court—As a verdict must, if set aside, be set aside generally, and this verdict is agreed to be right as to the count which is found for the plaintiff, there is no reason that he should pay the costs of the former trial.

12 Mod.  
439. Anon.  
Str. 466.

It is said, that when a new trial is granted the first verdict ought to stand as a security, for that otherwise the party against whom it was obtained may spirit away the witnesses upon whose testimony it was founded, and thereby deprive the other party both of the benefit of the first verdict, and of the means of obtaining a second.

Salk. 649.  
Clark v.  
Udall.  
Str. 672.

It is in the general true, that if a new trial have been granted, and there be a verdict for the same party in whose favour the verdict upon the first trial was given, the court will not grant a third trial.

6 Mod. 22.  
[The court  
will grant  
any number  
of trials in the same action,

But upon the particular circumstances of a case, as if the second verdict have been obtained by unfair practice, the court will grant a third trial.

if the verdicts be against law. *Tindal v. Brown*, 1 Term Rep. 171.]

Vin. Trial,  
467. pl. 4.

It is said, that courts of equity do not grant a new trial as a thing of course, although an estate of inheritance will be bound by the verdict; for that the granting or not granting of a new trial always depends upon the circumstances of the case.

Salk. 650.  
Str. 113.  
392.  
Sayer, 203.

A new trial cannot be granted by an inferior court, and if the judge thereof do grant one, a *mandamus* lies for a *procedendo ad judicium* upon the verdict.

[But he may set a verdict aside for irregularity. *Rex v. Peters*, 1 Burr. 572. *Jewel v. Hill*, 1 Str. 499.]

## 2. After a Trial at Bar.

1 Sid. 58.  
Salk. 648.  
7 Mod. 37.

It is laid down in divers cases, that the court ought not to grant a new trial after a trial at bar, unless there have been a misbehaviour

haviour in the jury; for that a trial at bar, by reason of its greater solemnity, is of much more authority than a trial at *nisi prius*. 12 Mod. 93. 128. 1 P. Wms. 213. Prec. in Ch. 193. Ld. Raym. 514.

But it has been holden in other cases, that the court ought, if the circumstances of the case require it, to grant a new trial after a trial at bar. Str. 584. 1105. Ld. Raym. 1360. [1 Burr. 395.]

And it is in one of these cases observed, that in the case of *Wood v. Gunston*, which is the first case reported in the books wherein a new trial was granted, it was granted after a trial at bar. Str. 585. Musgrave v. Nevins. [1 Vez. 28.]

As the verdict upon an issue directed from the court of Chancery is only to inform the conscience of the Chancellor, this court frequently grants a new trial after a trial at bar. Salk. 650. Fenwick v. Lady Grosvenor.

[A new trial will rarely, if ever, be granted after a trial at bar in a writ of right: the law has made this conclusive: and as the practice of granting new trials has been chiefly taken up since the disuse of attainds, and it is pretty clear, that no attaind lay in such case, this has been argued as an additional objection.] Tyllén v. Clarke, 2 Bl. Rep. 941.

### 3. On account of a Defect or Mistake of the Judge before whom the Cause was tried.

X If the judge before whom a cause was tried were therein interested, the court will grant a new trial. And it is said the court will do this, notwithstanding both parties consented to the cause being tried before such judge; for it is not to be imagined that he could be quite indifferent. 2 Lill. Abr. 749.

A new trial was granted, because a peer of the realm who was interested in the cause sat upon the bench during the trial. 11 Mod. 119. Lady Herbert v. Shaw.

If the judge before whom the cause was tried made any mistake, the court will grant a new trial; for a judge of *nisi prius* is rather to be considered as having acted in a ministerial than a judicial capacity; and as the ground of granting a new trial is doing justice to the party injured by the verdict, it ought as well to be granted on account of a mistake in the judge, as upon account of a mistake in the jury. 10 Mod. 202. Reg. v. the Corp. of Heston.

If the judge before whom the cause was tried have refused to admit proper evidence, this is a good reason for granting a new trial. 6 Mod. 242. 7 Mod. 53. 64.

If the judge before whom the cause was tried admit improper evidence which is objected to, the more regular way is to tender a bill of exceptions: but, notwithstanding this have been omitted, the court will grant a new trial. 7 Mod. 61. Thomkins v. Hill. 7 Mod. 53.

[If the supposed misdirection be a technical objection in point of law, and substantial justice be done, or, generally, if the merits have been fairly and fully tried, a new trial will not be granted; for the application is to the discretion of the court.] Edmonson v. Machell. 2 Term Rep. 4.

4. On account of a Defect, Mistake, or Fault of the Jury by whom the Cause was tried.

11 Mod. 1. If the sheriff did not follow the direction of a rule of court in returning the jury, this is a good reason for granting a new trial.

12 Mod. 567. Anon. 12 Mod. / 584. But, if the party, against whom the verdict is in such case found, did make a defence at the trial, the court will not grant a new trial; for, as he would have had the advantage of the verdict if it had been in his favour, he ought to be bound by it.

Cro. Eliz. 57. Diptin v. Spratt. 1 RoH. Abr. 196. pl. 3. In the *venire facias* there was the name of *Thomas Bucker of A.* In the *distringas* this name was left out, and the name of *Thomas Carter of A.* was inserted. *Thomas Carter of A.* being sworn upon the jury which tried the cause, the verdict was holden to be void; because the cause was not tried by twelve of the persons returned upon the pannel.

Cro. Eliz. 222. Fernor v. Dorrington. In the *venire facias* and in the *distringas* there was the name of *John Taverner.* A person of the name of *John Turner* being sworn upon the jury which tried the cause, the court upon a motion in arrest of judgment was clear, that if the variance had been in the christian name judgment ought to be arrested: but they had some doubt, whether, as the variance was in the surname, this ought now to be done; because a man may have two surnames: It was afterwards holden, that judgment should be arrested.

Barnes, 454. Wrey v. Thorn. A person was returned and sworn upon the jury by the name of *Henry*, a new trial being moved for upon an affidavit that his christian name was *Harry*, it was refused. And by the court—As the record and the jury process are right, an affidavit ought not to be received to contradict them. This was the person who was returned and intended to be upon the jury, and it is commonly understood, that *Henry* and *Harry* are the same name.

Barnes, 453. Norman v. Beaumont. A person of the name of *Richard Sheppard* was returned to serve as a juror on the crown side. This person being in the *nisi prius* court, when *Richard Gratter* returned upon the *nisi prius* pannel was called, he answered, and was sworn upon the jury in the room of *Gratter*. A new trial being moved for on the part of the defendant, it was said, that the defendant ought to have challenged this man, and that the court will not now receive an affidavit to contradict the record: but a new trial was granted. And by the court—The court are not, in this case, concluded by the record. The twelve jurors who try a cause are, by the 3 Geo. 2., to be drawn out of a box, and consequently, as this man's name never was in the box, the cause has not been tried.

Barnes, 455. Ruffel v. Ball. *John Peace*, who was returned upon the pannel, did not appear: but when he was called, his son answered, and was sworn upon the jury. A new trial was granted. And by the court—This verdict was not found by twelve of the persons returned upon the pannel.

A person

A person returned upon the pannel by the name of *Hosper* was challenged, and the challenge was allowed. This man being afterwards sworn upon the jury as a *talesman* by the name of *Hook*, a new trial was granted.

Ld. Raym.  
1410.  
Parker v.  
Thornton.

The court will not grant a new trial, because one of the jurors was related to one of the parties; for the other party, who might have challenged this person, ought to suffer for his neglect.

1 Vent. 30.  
Cotton v.  
Dainty.  
Sty. 10.

A new trial being moved for, because one of the jurors had a joint depending with the plaintiff, against whom the verdict was found, it was refused. And by the court—Why did not the plaintiff challenge this man?

Sty. 129.  
Loveday's  
case.

If there were good cause of challenge to one of the jurors, but this was not known, and consequently could not be taken advantage of at the trial, the court will grant a new trial.

7 Mod. 54.  
Hyon v.  
Ballard.

A new trial was granted upon affidavits of eleven of the jurors, setting forth that they had agreed to find a verdict for the plaintiff, and to give him five shillings damages; but that the foreman had, by mistake, given a verdict for the defendant.

Rep. of Pr.  
in C. B. 66.  
Baker v.  
Miles.

A new trial was granted, because the jury found a verdict for the plaintiff, notwithstanding they were directed by the judge before whom the cause was tried, that upon the evidence they ought to find for the defendant.

Sayer, 2.  
Golding v.  
Crowle.

In an indictment, for putting ducats into the pocket of the prosecutor with an intent to charge him with felony, the jury found the defendant guilty generally. Upon a motion for a new trial affidavits of all the jurors were produced, in which they swore, that they only intended to find him guilty of the fact of putting the ducats into the prosecutor's pocket, but not of the intent; and *Foster*, J. before whom the indictment was tried, reported, that his direction to the jury was, that in case they did not think the defendant guilty of the intent they ought to acquit him. A new trial was granted. And by *Lee*, Ch. J.—We do not grant a new trial on account of an after-thought of the jurors, for the doing of this would be a bad precedent; but because the verdict was contrary to the direction of the judge in a matter of law. And by *Denison*, J.—If the verdict had been as the jury intended to find it, namely, that the defendant was guilty of the fact but not of the intent, it would have been an incomplete verdict, and consequently no judgment could have been given.

Sayer, 35.  
Rex v.  
Simons.

[It is a general rule, that if the judge of *nisi prius* directs a jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial; and when the judge, upon a doubt of law, directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial. But to those general rules there are some limitations as clear as the rules themselves: one is, that if the judge should direct the jury plainly and certainly wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the superior court, under whose direction all trials at *nisi prius* are (*Salk.* 643.)

Per Lord  
Hewitt, r.  
Ca. Temp.  
Hardw. 26.

that the judge was undoubtedly mistaken; the court would not grant a new trial, because it would be putting the parties to trouble to no purpose; and if the next judge should direct the jury in like manner, and they find accordingly, there must be a new trial for misdirection. Another limitation is, that if it appear upon the record before the court, that it is impossible that the defendant should have judgment by reason of his bad plea, though the verdict were found for him, the court would not grant a new trial. But then these things must appear very clearly, and it must be where every thing appears on the record that can possibly arise upon the trial; for if all the matter do not appear, and the verdict may possibly prejudice the defendant in point of law, the court ought in justice to grant a new trial.]

Str. 1106.  
1142.

It is in the general true, that if the verdict be contrary to evidence, the court will grant a new trial.

But in some cases the court will not grant a new trial, although the verdict be contrary to evidence.

1 Barn. 9.

317. 333.

[In a late case, *Grove, J.* said, he remembered a

case tried some years ago at Bristol, where a new trial was granted as to one issue out of several which had been found against the evidence. 6 Term Rep. 626.]

Salk. 644.

Smith v.

Frampton.

In an action upon the case against *J. S.* for negligently keeping his fire, by means whereof the house of the plaintiff was burnt down, the verdict was for the defendant. A new trial being moved for, it was refused, although the verdict was contrary to evidence; because it was a hard action.

Salk. 653.

Dunckley v.

Wade.

But, if in a hard action there be a verdict for the plaintiff, the court will, in case the verdict be contrary to evidence, grant a new trial.

Salk. 648.

Sparks v.

Spicer.

*J. S.* being hung in chains by the sheriff upon the soil of *J. N.*, in an action brought by *J. N.* a verdict was found for the defendant. The court, although it was contrary to evidence, refused to grant a new trial; it appearing that the sheriff had done this merely for the conveniency of the place, and not with a design to affront or annoy *J. N.*

Salk. 646.

Deerley v.

the Duchess

of Mazarine.

[In a late

case where

the jury

found a ver-

dict for the plaintiff upon a presumption contrary to evidence, the court refused to grant a new trial, be-

cause the plaintiff was entitled to recover in conscience and equity. *Wilkinson v. Payne*, 4 Term Rep.

468.]

In an action of *assumpsit* the jury found a verdict for the plaintiff, notwithstanding the defendant proved her defence, which was coverture. A new trial being moved for, it was refused. And by the court—As the defendant was reputed to be a feme sole, and lived as such, she ought not to have set up such a defence, in order to prevent the plaintiff from recovering a just debt.

Salk. 644.

Smith v.

Page.

The plaintiff in an action of ejectment, who was a mortgagee, claimed under a surrender of the premises as being copyhold; whereas it appeared that they were not copyhold. The defendant claimed under a voluntary conveyance. A verdict being found

found for the plaintiff, the court, although it was contrary to evidence, refused to grant a new trial; because the granting thereof would, as was said, be contrary to the real justice of the case.

An action of *trover* being brought by a lessor against his lessee, for some trees cut down by the latter, a verdict contrary to evidence was found for the defendant: yet a new trial was refused; because it appeared, that the trees were cut down in making ditches, which were of more advantage to the land than the value of the trees.

Salk. 47.  
Starr v.  
Wade.

A new trial being moved for in an action of trespass, the judge before whom the cause was tried reported, that the trespass was proved, and that the jury ought, according to the evidence, to have found a verdict for the plaintiff but that, in his opinion, sixpence damages ought to have been sufficient. A new trial was refused. And by Lord *Mansfield*, Ch. J.—As the granting of a new trial is discretionary, the court will never minister to the passions of either party, by granting one in a case like the present, wherein the justice of the case by no means requires it.

MS. Rep.  
Macro v.  
Hull, Mich.  
30 G. 2. in  
B. R.  
[1 Burr.  
11. S. C.]

Upon a motion for a new trial in an action for a libel accusing the plaintiff of disaffection, the judge before whom the cause was tried reported, that the jury had found a verdict for the defendant contrary both to evidence and his direction: but that, as the general character of the plaintiff was proved to be that of a Jacobite, and no damage was proved to have been sustained, the jury ought not in his opinion to have given more than two shillings and sixpence damages. The court refused to grant a new trial. And by Lord *Mansfield*, Ch. J.—A new trial ought never to be granted, unless some manifest injustice be done by the verdict. As this is a vindictive action, and it was not proved that the plaintiff sustained any damage, the granting of a new trial, by which the plaintiff in all probability would be money out of pocket if he should obtain a verdict, would answer no other end than that of vexing the defendant. It is the duty of the court to see, that substantial justice be in every case done to both parties; but they ought never to minister to the passions of either.

MS. Rep.  
Burton v.  
Thompson,  
Mich.  
32 G. 2.  
in B. R.  
[2 Burr.  
664. S. C.  
Marth v.  
Bower,  
2 Bl. Rep.  
351. S. P.]

A new trial has in some cases been granted, because the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

In one case the verdict was for the plaintiff: but upon the report of *Willis*, Ch. J. before whom the cause was tried, that the weight of evidence was in his opinion with the defendant, a new trial was granted.

1 Barn. 322.  
Wheeler v.  
Pitt, Mich.  
8 G. 2.

*Ryder*, Ch. J., before whom the cause was trial, reported, that there was evidence on both sides: but that the evidence for the party in whose favour the verdict was, was so very slight, that the jury ought not in his opinion to have regarded it; and that the evidence for the other party was very strong; and he added that he was dissatisfied with the verdict. A new trial was granted.

Sayer, 164.  
Berks v.  
Mafon, Hil.  
29 G. 2.

MS. Rep.  
Bright v.  
Enion, Trin.  
30 G. 2. in  
B. R.  
[1 Burr. 390.  
S. C.]

In another case, wherein a new trial was granted, it was laid down generally, that the court ought to grant a new trial, if the verdict be in the opinion of the judge before whom the cause was tried contrary to the weight of evidence, although there were evidence on both sides.

A new trial has in some other cases been refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

Str. 1142.  
Ashley v.  
Ashley,  
Mich.  
14 G. 2.

In one case where the judge, before whom the cause was tried, reported, that the weight of evidence was with the plaintiff, and that in his opinion the jury ought to have found a verdict for him, a new trial was refused. And by the court—As there was evidence for the defendant, the jury were the proper persons to judge on which side the weight of evidence was.

Str. 1142.  
Smith v.  
Huggins,  
Mich.  
14 G. 2.  
[Anon.]

In another case a new trial was refused, although *Lee*, Ch. J. reported, that the evidence for the plaintiff was very weak, and that he had summed up the evidence strongly for the defendant.

1 Willf. 22. *Hankey v. Trotman*, 1 Bl. Rep. 1. S. P. and *Smith v. Parkhurst*, 2 Str. 1105. It is well observed by the late judicious editor of Sir John Strange's Reports, that as the distinction between a verdict against evidence and against very weak evidence must in many instances appear scarcely perceptible, and the granting of new trials is entirely discretionary in the courts, it rather seems, as if the several cases upon the subject warrant the conclusion, that the courts will grant a new trial where the verdict is manifestly against the weight of evidence, although some proof has been adduced on the other side; provided injustice seems to have been done by the verdict, and the cause is of sufficient value. *Vide Berks v. Mason*, Say. 264. *Norris v. Freeman*, 3 Willf. 39.]

MS. Rep.  
Francis v.  
Baker, Hil.  
3 G. 3. in  
C. B.

In another case, *Prett*, Ch. J. before whom the cause was tried, after reporting the evidence specially, expressed himself to this effect: If I had been upon the jury, and had known no more of the witnesses than I did when this cause was tried; I should have thought the verdict ought to have been for the defendant; but I do not choose to declare myself dissatisfied with the verdict, because, where there is a contrariety of evidence as to the principal matter in issue, and the characters of the witnesses on both sides stand unimpeached, the weight of evidence does not depend altogether upon the number of witnesses; for it is the province of the jury, who may know them all, to determine which witness they will give credit to; and no judge has in my opinion a right to blame a jury for exercising their power of determining in such case. He concluded with leaving the matter to the other justices. A new trial was refused. And by *Clive*, J.—The granting of a new trial in this case would be taking away that power which is by the constitution vested in the jury. And by *Bathurst*, J.—As there was in this case strong evidence for the plaintiff, a new trial ought not to be granted; although the weight of evidence was in my Lord Chief Justice's opinion with the defendant. And by *Gould*, J.—It is difficult to draw a line as to the granting of a new trial; and perhaps the granting or not granting of it must always depend upon the circumstances of the case. In the present case there is no reason to grant one.



It is in one case said, that if in an action which sounds in damages, as an action of trespass, only half a farthing be assessed for damages, the court will not grant a new trial, it being in the power of the jury to assess as small damages as they please in such action.

2 Roll. Rep.  
21.  
Marham v.  
Buller.

In an action for words the plaintiff had a verdict with twenty shillings damages. A new trial being moved for, it was refused. And by the court—This is a hard case; but the court has constantly refused to grant a new trial on account of the smallness of the damages.

Str. 940.  
Hayward v.  
Newton,  
Mich. 6 G. 2.

In an action for a malicious prosecution of the plaintiff for felony the damages were only six shillings: yet the court refused to grant a new trial. It is moreover in this case said, that the court will never grant a new trial on account of the smallness of the damages; because an attainder would not lie in such a case against the jury, it not being a false verdict: and it is added, that new trials were introduced in the room of attainders, as being easier and more expeditious remedies.

Str. 1051.  
Barker v.  
Sir Woolston  
Dixie, Trin.  
6 G. 2.  
[Maurice v.  
Brecknock,  
Doug. 509.  
S. P.]

In an action of *scandalum magnatum* the jury found a verdict for the plaintiff with only twelve pence damages. A new trial being moved for on account of the smallness of the damages, it was refused. And by the court—No instance has been produced of granting a new trial on account of the smallness of the damages.

Barnes, 445.  
Lord Gower  
v. Heath, 1  
Trin.  
13 G. 2.

A new trial being moved for on account of the smallness of the damages, it was refused. And by the court—Where the demand is certain, as if it arise upon a promissory note, the court will grant a new trial on account of the smallness of the damages: but, where the demand is uncertain, as in the present case where it is for the cure of a wound, the court ought not to grant a new trial on account of the smallness of the damages.

Barnes, 455.  
Ruffell v.  
Bail, East.  
18 G. 2.

In an action of covenant, in which the damages sustained appeared to be one hundred pounds, there was judgment upon a demurrer for the plaintiff. A less sum being found by the jury upon the execution of a writ of inquiry, a new writ of inquiry was awarded. And by the court—As an action of debt might have been brought for the hundred pounds, the jury ought to have found damages to the amount of the whole sum, unless the defendant had proved something to lessen it. The general rule, of not granting a new trial, or a new writ of inquiry, upon account of the smallness of the damages, does not extend to this case.

Salk. 647.  
Anon.  
Mich.  
10 W. 3.

Upon a contract for stock the plaintiff and J. S. each deposited two hundred pounds in the hands of the defendant. As J. S. did not perform his part of the contract, the plaintiff brought an action for the four hundred pounds deposited, and obtained judgment upon a demurrer. A writ of inquiry was executed, and the plaintiff proved his case; yet the jury, upon a mistaken motion that the defendant could not part with the money without the consent of both parties, found only a penny damages. A new writ of inquiry was awarded. And by the court—The

Str. 425.  
Woodford  
v. Eades,  
East. 7 G. 1.

rule, of not setting aside a verdict on account of the smallness of the damages, does not extend to this case, in which the jury were mistaken in a point of law.

**Barnes, 48. Tutton v. Andrews, Trin. 14 G. 2. [Markham v. Middleton, 2 Str. 1259. S.P.]** Upon the execution of a writ of inquiry the sheriff admitted improper evidence upon the part of the defendant; by reason of which the damages found were much less than they would otherwise have been. A new writ of inquiry was awarded. And by the court—A notion has prevailed, that where the damages are excessive the court may grant a new trial; but that it cannot where they are too small: but there seems to be no good reason why a new trial should not be as well granted in the latter case as in the former.

**Sty. 462. Wood v. Gunston, Mich. 7 C. 2.** It is said, that a new trial was granted, on account of the excessiveness of the damages in an action for words. And by *Glyn*, Ch. J.—Wherever the court believes that the verdict was contrary to the direction of the judge before whom the cause was tried, a new trial may be granted. But in a fuller report of this case, in page 466 of the same book, the new trial does not appear to have been granted merely on account of the excessiveness of the damages, but because the jury had shewn a partiality to the plaintiff.

**Comb. 357. Ash v. Ash, Hil. 8 W. 3.** In an action of false imprisonment the jury found a verdict for the plaintiff with 2000*l.* damages, although the plaintiff had been confined by her mother only two or three hours. A new trial was granted on account of the excessiveness of the damages. And by *Holt*, Ch. J.—The jury were shy of giving their reason for their verdict, thinking they had an absolute power to find it as they pleased. This is a mistake; for the jury are to try the cause with the assistance of the judge, and they ought to give their reason for their verdict, if required by the judge so to do, that they may, in case they proceed upon a mistaken notion, be set right.

**Str. 691. Chambers v. Robinson, Hil. 12 G. 1. [Vide 2 Will. 249.]** In an action for maliciously prosecuting an indictment for perjury, there was a verdict for the plaintiff with a thousand pounds damages; a new trial was granted. And by the court—It is fit the defendant should try another jury, before he is finally charged with such damages.

**2 Mod. 150. Lord Townsend v. Hughes, Hil. 28 C. 2.** In an action of *scandalum magnatum* for these words, *he is an unworthy man, and acts against law and reason*, the jury found a verdict for the plaintiff with 4000*l.* damages. Upon a motion for a new trial it was sworn, that one of the jury had confessed that they did not find such large damages because they thought the plaintiff so much damned, but that he might have an opportunity of shewing himself noble by remitting the damages. A new trial was refused. And by *North*, Ch. J.—In a criminal case a man is by *Magna Charta* to be fined with a *salvo contenemento suo*, and consequently no greater fine is to be imposed than he is able to pay; but in a civil action the plaintiff ought to recover a compensation for the damages he has sustained: and he ought in some cases to recover both for the damages he has sustained, and for those which he may sustain. In an action for words, if the words are not actionable in themselves, the jury are only to consider what

damages

damages the plaintiff has sustained, and not what he may thereafter sustain; because for the latter he may have a new action: but, if the words are in themselves actionable, the jury ought as well to consider the damages which the plaintiff may afterwards sustain, as those which he has sustained. In the present case, the court cannot set a value upon the plaintiff's honour. The jury have given him 4000*l.* damages for the injury thereto done, and as they are by law the proper judges of damages, the court has no power to lessen these, or to grant a new trial. It would moreover be very improper, that the court should take notice upon what account the jury found their verdict as it is found. *Wyndham, J.* was of the same opinion. *Atkins, J.* was of a different opinion. And by him—In the case of *Wood v. Gunston*, which was an action upon the case for calling the plaintiff bankrupt, the court granted a new trial; because the damages of 500*l.* found by the jury were in the opinion of the court excessive. In the present case, the jury ought only to have considered the damages which the plaintiff had sustained, and not to have given large damages, that he might have an opportunity of shewing himself noble in remitting them. *Scroggs, J.* was of opinion with the Ch. J. And by him—If I had been upon the jury, I should not have assessed such large damages: but as it does not appear that there was any unfair practice upon the jury, a new trial ought not to be granted. Suppose the jury had found only a penny damages, the court would not have granted a new trial, in order to give the plaintiff a chance of obtaining larger damages; and it would be equally unreasonable to grant a new trial, in order to give the defendant a chance of having less damages assessed.

In an action for these words spoken of a tradesman, *thou art a beggarly rogue, go pay thy debts*, the jury found a verdict for the plaintiff with 800*l.* damages. A new trial being moved for on account of the excessiveness of the damages, it was refused; because the judge, before whom the cause was tried, reported, that the plaintiff had given the defendant no provocation, and that he believed the jury had done what they thought to be right.

In an action for criminal conversation with the plaintiff's wife, there was a verdict for the plaintiff with 500*l.* damages. Upon a motion for a new trial on account of the excessiveness of the damages, it appeared from the report of Lord Mansfield, Ch. J. before whom the cause was tried, that the woman had seduced the defendant, and that the defendant was in low circumstances, being only a clerk in the Exchequer, at a salary of about fifty pounds a year. A new trial was refused. And by Lord Mansfield, Ch. J.—The jury had all the circumstances under their consideration, and in an action founded upon a *tort* they are the proper judges as to the *quantum* of damages.

grant a new trial on account of the excessiveness of the damages, though the conduct of the husband appeared in the most unfavourable light. *Duberley v. Gunning*, 4 Term Rep. 631. However, in a subsequent case, in which the case of *Duberley v. Gunning* was pressed upon the court as establishing the position alluded to in the text, and certainly advanced by the judges who refused the new trial in the case of *Duberley v. Gunning*, namely, that in cases of *tort*, where there is no certain rule by which the damages

2 Jon. 200.  
Boulsworth  
v. Pilkington,  
Hil.  
33 C. 2.

MS. Reps:  
Wilsford v.  
Berkley,  
Trin.  
31 G. 2. in  
B. R.  
[1 Burr.  
609. S. C.  
In a late case  
of this kind,  
the court of  
King's  
Bench, dis-  
sent. Buller,  
J. refused to

damages can be ascertained, the court will not grant a new trial on the ground of excessive damages—Lord Kenyon is reported to say—“It must be remembered, that although the case of *Duberley v. Gun-*ning was decided after a very full discussion of the subject, the court were *not unanimous* in the determination. But, *whether rightly or not decided*, that is a case *sui generis*, and cannot govern the present.” The then present case was an action for an assault and battery, in which the court granted a new trial on account of the largeness of the damages. *Jones v. Sparrow*, 5 Term Rep. 257. In a case of the same nature with that of *Jones v. Sparrow*, Lord Mansfield said, “There is no doubt but the court have the power of taking the opinion of a second jury where the damages are excessive. But all these questions depend upon their own circumstances, on which the court will exercise their discretion.” *Ducker v. Wood*, 1 Term Rep. 277. In that case the new trial was refused, and so it was by the same court in *Benson v. Frederick*, 3 Burr. 1845; and by the court of Common Pleas in *Leich v. Pope*, 2 Bl. Rep. 184; but in both those cases the courts said, they had the power of granting a new trial where the damages given appeared to be greatly disproportionate to the injury received. And in the case of *Hurry v. Watson*, Tr. 27 G. 3. C. B. where 300*l.* had been given in an action for a malicious prosecution, the court (on a motion to set aside the verdict for excessive damages) said, they had the power of granting a new trial; and they would have exercised it in that case, if the plaintiff had not agreed to accept 150*l.* In a case where the court of Common Pleas refused to grant a new trial on this account, though the Chief Justice said, “there was not one single case (that was law) in all the books to be found where the court had granted a new trial for excessive damages in actions for torts;” he added, “We desire to be understood, that this court does not say, or lay down any rule that there can never happen a case of such excessive damages in tort, where the court may not grant a new trial: but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against at first blush.” *Beardmore v. Carrington*, 2 Wils. 244. The concession here made is indeed guarded and confined to extreme cases: but when we recollect at what time, upon what occasion, and by whom it was made, it leaves little room to doubt of the power of the courts to interpose in correcting the extravagance of juries. The learned judge, seemingly provoked to feel himself obliged to acknowledge the necessity, and therefore the legality of such a power, (for he seems to rest the legality upon the necessity,) anxiously endeavours, by way of revenge, to restrain and cramp the exercise of it. The damages must be enormous, more than excessive, to warrant the interposition of the court: and this must be apparent, not to the judges, but to all mankind. The judgment of the court must be authorized by the cry of the multitude! judicial discretion must be guided by popular opinion! The law upon this point seems rather more distinctly as well as more temperately stated by De Grey, Ch. J. in the case of *Sharpe v. Brice*—“It has never been laid down,” says he, “that the court will not grant a new trial for excessive damages in any cases of tort. It was held, so long ago as in *Comb. 357*. that the jury have not a despotic power in such actions. The utmost that can be said is, and very truly, that the same rule does not prevail upon questions of tort, as of contract. In contract, the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in torts, a greater latitude is allowed to the jury; and the damages must be excessive and outrageous to require or warrant a new trial.” 2 Bl. Rep. 942. We cannot help taking notice, that in several cases where the judges have admitted that a new trial may be granted for excessive damages, they have added words of amplification: this we conceive, in propriety of language, to be unnecessary; for, as far as we recollect, *excessive* is never predicated of any subject, but to denote its extraordinary intenseness. Thus Milton—“Dark with *excessive* bright.”]

MS. Rep.  
Leman v.  
Allen, Hil.  
3 G. 3. in  
C. B.  
[2 Wils. 160.  
S. C. See  
Huckle v.  
Money,  
2 Wils. 205.  
Redshaw v.  
Brooke,  
Id. 405.  
Grey v.  
Grant,  
Id. 252. *Bruce v. Rawlins*, 3 Wils. 61. where a new trial was refused, on the ground that the damages were not excessive.]

In an action of trespass and false imprisonment there was a verdict for the plaintiff with 300*l.* damages. A new trial being moved for on account of the excessiveness of the damages, it was refused; because the court did not upon the circumstances of the case think the damages excessive. It was in this case said by *Pratt*, Ch. J.—The court may grant a new trial on account of the excessiveness of the damages, although the action be founded upon a tort, and consequently the jury have no certain rule of computing damages: but the court should be very cautious of granting one in such action, and ought not to do it, unless the damages are such, as do at the first blush appear to be quite outrageous.

Salk. 645.  
Dent v. the  
Hundred of  
Hertford.

A new trial was granted upon its being discovered, after the trial, that the foreman of the jury had declared, that the plaintiff should never have a verdict whatever witnesses he might produce.

If the jury receive written evidence after they are gone from the bar to consider of their verdict, this is a good reason for granting a new trial.

1 Sid. 235.  
Goodman v.  
Cothering-  
ton.

If after the jury are gone from the bar to consider of their verdict, they hear the evidence of a witness who was before examined, the verdict may be set aside, notwithstanding the evidence were to the same effect as the evidence given in court.

Cro. Eliz.  
189.  
Metcalf v.  
Deane.

But it is said, that the court will not in either of these cases grant a new trial, unless it be indorsed upon the *posse*, that the jury did receive written or hear parol evidence after they were gone from the bar; for that this cannot be shewn by affidavit.

1 Sid. 235.  
Goodman v.  
Cothering-  
ton. Cro.  
Eliz. 189.

If the jury carry written evidence which was given in court with them from the bar, without the direction or leave of the court, this is not a reason for the granting of a new trial: but the jury are punishable.

Salk. 645.  
King v.  
Burdett.

A new trial was granted, because the jury had thrown up crosses or pile, whether they should give the plaintiff five hundred or three hundred pounds damages.

Bunb. 51.  
Melish v. 1  
Arnold.

2 Lev. 150. 205.

The jury drew lots in order to determine for whom they should find a verdict. A new trial was granted, notwithstanding the verdict was found for the party, who in the opinion of the judge was entitled to a verdict.

Str. 642.  
Hale v. 1  
Cove.

[A new trial being moved for upon an affidavit by the defendant's attorney, of a confession of a jurymen to him, that the jury drew lots which six of them should determine the verdict, it was refused; and the court said, that there being no affidavit by the jurymen, or any other that was consulant of the transaction, this was too loose and slight a suggestion. However, in a late case (a), the court refused to receive the affidavit of the jurymen themselves to substantiate such a fact.]

Aylet v.  
Jewel, 2 Bl.  
Rep. 1299.  
(a) Vallie v.  
Delaval,  
1 Term Rep.  
11. & vide  
Pryor v.  
Powers,  
1 Keb. 811.

The court did in one case refuse to grant a new trial, although the jury found a general verdict, after it was agreed by the counsel on both sides that a special one should be found, and would not give their reason for finding a general one. But it appears that the new trial was in this case refused, because it was moved for after a trial at bar.

7 Mod. 37.  
Gay v. Cross.

In another case, wherein a special verdict was prayed, and the jury, after being directed by the judge before whom the cause was tried to find a special verdict, found a general verdict, a new trial was granted.

1 P. Wms.  
213. Reg.  
v. the Corp.  
of Bewley.

A new trial being moved for, because the jurors had voted and found their verdict according to the majority of votes, it was refused.

Comb. 14.  
Anon.

The jurors had voted, and seven of them were for finding the verdict as it was found. A new trial being moved for, it was refused. And by *Lee*, Ch. J.—Nothing was in this case determined by chance. The five jurors might ultimately be convinced: but if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not now be received to say, that they did not acquiesce.

Sayer, 100.  
Lawrence v.  
Botwell.

[A new

Clark v.  
Stevenſon,  
2 Bl. Rep.  
303.

[A new trial has been refused upon a subsequent declaration by the jury, where the verdict given has been according to the real merits of the case.

Aubert v.  
Hardcastle,  
C. B. Trin.  
27 G. 3. MS.

In an action for the non-performance of a contract in not delivering 100 casks of good *Russia* tallow, which was tried before Lord *Loughborough* at the sittings after last term at *Guildhall*, a verdict was given for the defendants. *Adair*, Serj. moved for a rule to shew cause why there should not be a new trial. The ground upon which he moved it was, that a conversation had passed after the judge had summed up the evidence, between one of the jury and one *Cartwright* the last witness, in which a material piece of evidence had been disclosed: that this conversation was not heard by the plaintiffs, and therefore they had not an opportunity to controvert what the witness said: that if they had, they could have directly contradicted it. He then offered affidavits to induce the court to believe that the jury had founded their verdict upon this evidence. The circumstances of the case were these: the plaintiffs had contracted with the defendants for 100 casks of good *Russia* tallow; fifty of these had been delivered and accepted, but the plaintiffs refused to accept the rest, alleging that it was of an inferior quality. Before the action was commenced, a proposal for an accommodation was made, by the defendants paying to the plaintiffs 3 s. *per cwt.*, which was the difference between the price tallow then sold for, and the price for which the plaintiffs had contracted. But this proposal was not acceded to, and it was respecting this that the conversation passed upon which this motion was grounded. One of the jury asked the witness *Cartwright*, why it was not agreed to. His answer was, because the plaintiffs wanted to settle the matter in dispute by casks of 4 *cwt.* instead of 7 *cwt.* Lord *L.*, after reporting the evidence, said, that this was a new ground for an application, and such an one as he much doubted whether the court ought to encourage. From the situation of the witnesses at *Guildhall*, conversations must frequently pass between them and the jury, and it was impossible but such conversations must sometimes escape the court: that if new trials were to be granted upon suggestions of this kind, causes would never be finally settled: that the question here put was, he thought, an idle one, and that no inference could be drawn from it to affect the decision of the jury. The question which he left to the jury was, whether this was good merchantable tallow, or not: no fraud was pretended on either side: both parties wished to act right: the scale of evidence was nearly equal, different opinions having been given on each side of the samples of tallow, which the defendants had produced. This question, why the parties did not settle the matter, could not possibly apply to that. Besides, the jury had in the course of the trial calculated that the casks were above 7 *cwt.*, so that this answer could not possibly have any influence with them.]

5. On account of a Neglect, or Mistake of a Counsellor or an Attorney in the Cause.

A new trial is said to have been granted; because the counsel for the defendant, who did not expect that the cause would be called on so soon, was absent. But it is added by the reporter, that a new trial had in a similar case been refused.

In a modern case, a new trial being moved for on account of the defendant's attorney having neglected to attend the trial, it was refused. And by the court—As the plaintiff has not been guilty of any misbehaviour or fault, there ought not to be a new trial, which, as his witnesses may die or be out of the way, may be very inconvenient to him: nor is it necessary to grant one; for the defendant, who is bound by the verdict, has a remedy against his attorney.

At the trial of a cause, a matter was mentioned by the judge before whom it was tried, the consequence of which, if it had been relied upon, must have been a verdict for the defendant. Instead of relying upon this, the defendant's counsel put his defence upon another matter, and there was a verdict for the plaintiff. A new trial being moved for, it was refused. And by the court—The act of a counsel in a cause is to be considered as the act of his client; and consequently, if the counsel waive a thing which would have been in favour of his client, it is the same thing as if the client himself waive it. The mistake of the judge or the jury is a good reason for granting a new trial; but the mistake of a counsel is not.

Salk. 645.  
Anon.

MS. Rep.  
Clifton v.  
Grey, Mich.  
31 G. 2. in  
B. R.

10 Mod.  
202, 203.  
Reg. v. the  
Corp of  
Helfton.  
[That a  
mistake in  
conducting  
a cause, is no  
ground for a  
new trial,  
see Vernon  
v. Hankey,  
2 Term Rep.  
120. Spong  
v. Hog, 2 Bl. Rep. 802.]

[But the discovery of new evidence by an attorney of an executor defendant then absent from *England*, though in the actual custody of the attorney himself, but not known by him so to be, hath been admitted as a sufficient ground for a new trial.]

Broadhead  
v. Marshall,  
2 Bl. Rep.  
955.

6. On account of a Neglect, Mistake, or Fault of one of the Parties, or one of his Witnesses.

A new trial being moved for, because a witness of the party moving for it did not appear at the trial, it was refused. And by the court—If a new trial were to be granted on this account, one may be granted in almost every case; for it will be always in the power of a party to prevail upon one of his witnesses to be absent, on purpose to make his absence a ground for obtaining a new trial.

Upon a motion for a new trial, the party moving for it offered an affidavit, that one of his material witnesses did not appear at the trial. The court would not suffer the affidavit to be read.

If the appearance at the trial of a material witness for one party were prevented by a contrivance of the other party, as by arresting the witness, this is a reason for granting a new trial.

If the appearance at the trial of a material witness were prevented by a sudden illness, this is a reason for granting a new trial.

1 Vent. 30.  
Cotton v.  
Dainty.

1 Barn. 322.  
Wheeler v.  
Pitt.

11 Mod.  
141. Davis  
v. Dayerell.

11 Mod. 1.  
6 Mod. 22.

Salk. 645.  
Anon.

The court refused to grant a new trial, because a material witness did not appear at the trial, unless the witness would make an affidavit of what he knew concerning the matter in question; that the court might judge of the materiality of his evidence.

Prec. in Ch.  
194. Tovey  
v. Young.

It is said, that a court of equity will grant a new trial, if it appear that a witness, upon whose testimony the verdict was principally founded, stands convicted of an infamous crime.

Salk. 653.  
Ford v.  
Tilly.  
12 Mod.  
584.

But it has been holden, that this is not a reason for granting a new trial. And by the court—If the record of the conviction of such a witness had been produced at the trial, the judge would not have admitted his testimony. As this was not done, the party who neglected to produce it ought to suffer for his neglect.

Turner v.  
Pearte,  
1 Term Rep.  
717.

[Although an objection to the competency of a witness discovered after the trial, is not, of itself, a sufficient ground for granting a new trial; yet it may have some weight with the court where the party applying appears to have merits.

Fabrilius v.  
Cock,  
5 Burr.  
1771.

If it appear that the witnesses, upon whose testimony the former verdict was given, were suborned, the court will grant a new trial.]

Salk. 273.  
647. 653.  
Prec. in Ch.  
194.  
Str. 691.

It is in divers cases laid down, that a new trial ought not to be granted; because the party who moves for it was not at the trial furnished with evidence, which it was in his power to have been furnished with.

[Gift v. Mason, 1 Term Rep. 84.]

12 Mod.  
584.

It is said in one case, that if material evidence, of which the party had no knowledge at the trial, be afterwards discovered, this is a reason for granting a new trial: but it may be inferred, from what is laid down in a modern case, that this case is not law.

MS. Rep.  
Walker v.  
Scott, Mich.  
23 G. 2. in  
B. R.

In an action for criminal conversation with the plaintiff's wife, there was a verdict for the plaintiff with 1000*l.* damages. A new trial was moved for, upon an affidavit of its having been discovered since the trial, that the woman was not the wife of the plaintiff. It was refused. And by the court—It is an established rule, that a new trial ought not to be granted upon the account of evidence discovered after the trial, which by using due diligence might have been discovered before. It is laid down in divers cases, that the court will not grant a new trial, because one of the parties was not at the trial prepared to make out his case. It would be of the most dangerous consequence to suffer one party, after he has heard the evidence of the other, to give new evidence. In the present case the defendant ought to have been prepared at the trial to have proved that the woman was not the plaintiff's wife; which was the very gist of the action.

Sayer, 28.  
Hutth v.  
Sheison.

A new trial being moved for, upon an affidavit that a material witness had made a mistake in giving his evidence at the trial, it was refused. And by the court—It would be of the most danger-

ous



ous consequence to set aside a verdict, because a witness has from inattention, or from the want of being prepared, made a mistake in giving his evidence.

It is in one case laid down, that embracery is a good reason for granting a new trial; but that maintenance is not.

11 Mod 118.  
Lady Herbert v. Shaw.

Upon a motion for a new trial it appeared, that the plaintiff's attorney had written letters to two persons upon the pannel, importuning them to appear, and setting forth the hardships his client had suffered. A new trial was granted, and the attorney, who was committed for having been guilty of embracery, was obliged to pay ten pounds to the other party by way of costs, before the court would consent to his being discharged.

2 Ventr. 173.  
Anon.  
Pasch.  
3 W. 3.

It was in a subsequent case holden, that although one of the parties have desired a person to appear as a jurymen, this is not a good reason for granting a new trial.

Str. 643.  
Snell v. Timbrel,  
Mich. 12 G. 1.

The latter case is said to have been determined upon the authority of the case of *Lady Herbert v. Shaw*. But the case alluded to does not seem to warrant the determination.

*Ibid.*

In that case the Duke of *Leeds* had written letters to all the persons upon the pannel; every one of which letters, after desiring the person to appear at the trial, concluded with these words, "Which I shall take as a great obligation, and shall be glad of an occasion to shew you how much I am, Sir, your humble servant." A new trial being moved for on account of these letters, it was refused upon the particular circumstance of the case; namely, that the defendant, who had had notice long before the trial, of these letters, did not move for a trial at bar, which the plaintiff had offered to consent to: but it was said by the court, that a letter of this kind is of the most dangerous consequence, it being a temptation to a jurymen to be partial.

11 Mod.  
119. Lady  
Herbert v.  
Shaw.

A new trial was moved for; because the plaintiff, in whose favour the verdict was, had after it was brought in given to every one of the jurors four pounds; whereas by a rule of the court they were entitled to no more than twenty shillings each. The court being equally divided, no rule could be made. *Morton, J.* and *Rainsford, J.* were of opinion, that although the plaintiff may be punishable for disobedience to the rule of the court, there was no reason for granting a new trial. *Keeling, Ch. J.* and *Twisslen, J.* were of opinion, that a new trial ought to be granted; for that, if either party may give what he please to the jurors after the verdict is brought in, the jurors will be frequently inclined to find a verdict for that party who is best able to reward them.

1 Ventr. 30.  
Cotton v.  
Daintry.

## 7. In an Action of Ejectment.

It is laid down in divers cases, that the court will not grant a new trial in an action of ejectment; because another action of ejectment may be brought, and, consequently, there is no necessity for granting a new trial.

1 Jon. 225.  
Salk. 648.  
650.  
Ld. Raym.  
514.

Str. 1106.  
Dormer v.  
Parkhurst,  
Hil. 12 G.2.

And in one case it is said, that the court will not grant a new trial in an action of ejectment, unless the case be so circumstanced, that justice cannot otherwise be attained.

1 Barn. 323.  
Brown v.  
Petcher,  
Mich. 8 G.2.

But these cases do not seem to be law; for in one modern case it is said, that the court will not grant a new trial in an action of ejectment, where the verdict is for the defendant; from whence it may fairly be inferred, that where the verdict is for the plaintiff a new trial may be granted.

MS. Rep.  
Wright on  
the dem. of  
Clymer v.  
Littler,  
Mich. 2 G.3.  
in B. R.  
[1 Bl. Rep.  
345. S. C.]

And in a very modern case it is expressly laid down, that where the verdict is for the plaintiff, the court will grant a new trial as readily in an action of ejectment as in any other action. A motion being made for a new trial in an action of ejectment, it was refused upon the particular circumstances of the case. But by Lord Mansfield, Ch. J.—It is not true, that the court will not in any case grant a new trial as readily in an action of ejectment as in any other action. If the verdict be for the defendant, the court will not grant a new trial but for very particular reasons; because, as the verdict in an action of ejectment is not conclusive, the plaintiff may bring another action of ejectment: but, where the verdict is for the plaintiff, the court will grant a new trial as readily in an action of ejectment as in any other action, and the court ought so to do; for if the possession should be changed in consequence of the verdict, it would sometimes answer no purpose for the party who has lost the possession, which was perhaps his only title, to be at liberty to bring another action of ejectment.

### 8. In a Penal Action.

Str. 899.  
Seymour qui  
tam v. Day.

In an action for the penalty given for killing a hare, the jury, contrary to the direction of the judge before whom the cause was tried, found a verdict for the defendant. A new trial being moved for, it was refused on account of the action being penal.

1 Barn. 316.  
Phillips qui  
tam v.  
Scullard.

In an action for the penalty given for selling less than two gallons of spirituous liquors, the fact was proved: and Eyre, Ch. J. before whom the cause was tried, directed the jury to find a verdict for the plaintiff. Notwithstanding this direction, a verdict was found for the defendant; yet a new trial was refused.

Burb. 253.  
Robinson  
qui tam v.  
Lequesne,  
Trin. 1 G.2.

In an action for the penalty given for a fraudulent exportation of Jesuits bark, the verdict was for the defendant. A motion being made for a new trial, it was refused. The reporter of this case, after saying it seemed to be admitted, that a new trial may upon the particular circumstances of the case be granted in a penal action, adds, that the counsel for the plaintiff were prepared with precedents in which it had been done: but he does not mention where any such precedent is to be met with, and the contrary is laid down in a subsequent case.

Str. 1238.  
Matthiſon  
qui tam v.  
Allanſon,  
Mich.  
18 G.2.

An action being brought for the penalty given by the statute against horse-racing, the jury found a verdict for the defendant. The verdict being contrary to evidence, a new trial was moved for, but was refused. And by the court—As there does not appear to have been any unfair practice of the defendant, this  
case

case is within the reason of the practice of the court of Exchequer, in which court a new trial is never granted at the instance of the plaintiff in an action for a penalty, unless the defendant have been guilty of unfair practice.

[But a new trial will be granted in a penal action even after a verdict for the defendant, if such verdict has proceeded upon the mistake of the judge.]

Calcraft v. Gibbs, 5 Term Rep. 19.

## 9. In an Indictment or Information.

If the defendant in an indictment or information have been acquitted, the court will not grant a new trial, notwithstanding the verdict were contrary to evidence.

1 Sid. 154.  
1 Lev. 124.  
Ld. Raym.  
63. 12 Mod. 9.

A new trial being moved for, after an acquittal in an indictment for a libel, because the verdict was contrary to evidence, it was refused. And by the court—A new trial ought not to be granted after an acquittal in a criminal case, unless the defendant have been guilty of unfair practice.

Salk. 646.  
Rex v. Bear.

The defendant in an information for a riot being acquitted, a new trial was refused, although the verdict was, in the opinion of the judge before whom the information was tried, contrary to evidence; because it did not appear, that the verdict was obtained by unfair practice of the defendant.

1 Show. 336.  
Rex v. Davis.  
12 Mod. 9.

The defendant in an information in the nature of a *quo warranto* being acquitted, a new trial was moved for, and the judge, before whom the information was tried, reported that the verdict was, in his opinion, contrary to evidence. The court of King's Bench being equally divided in opinion whether a new trial could be granted after an acquittal in such information, the case was adjourned to be argued before all the judges, who being likewise equally divided in opinion, the rule to shew cause why a new trial should not be granted was discharged.

Str. 101.  
Rex v. Bennett.

A new trial was moved for, because the verdict, which was for the defendant in an information in the nature of a *quo warranto*, was contrary to evidence. The court refused to grant a rule to shew cause. And by Lee, Ch. J.—In the case of the *King v. Bennett* the judges were equally divided in opinion, whether a new trial could in such case be granted; and in the case of the *King v. Jones*, which was in *Trin. 12 G. 1.* wherein the same question arose, a new trial was not granted, the court being equally divided in opinion upon the question.

Sayer, 102.  
Rex v. Blunt.  
[See vide  
contra Rex  
v. Francis,  
2 Term Rep.  
484.]

It is laid down, that if the acquittal in an indictment have been procured by a trick or fraud of the defendant, he may be punished for the trick or fraud; but that the court cannot grant a new trial.

1 Sid. 153.  
1 Lev. 9.

But it is in one case said, that, although the court will not grant a new trial after an acquittal in an indictment, because the verdict was contrary to evidence, the court may grant a new trial in case the acquittal were procured by a trick or fraud of the defendant.

Salk. 646.  
Rex v. Bear.

12 Mod. 9.  
Reg. v. Coke.

In one case a new trial was granted, after the defendant in an indictment for keeping a bawdy-house had been acquitted; because the trial was brought on by the defendant, and he had not given due notice of trial.

Sayer, 90.  
Rex v.  
Furber.

In another case a new trial was for the same reason granted, after an acquittal upon an indictment.

1 Sid. 50.  
Read v.  
Dawson,  
Mich.  
13 C. 2.

It is in one case said to have been holden, that the court cannot grant a new trial, at the instance of the defendant, in an indictment or information without the consent of the king's counsel.

Ld. Raym.  
63. Rex v.  
Stone,  
Mich.  
3 W. 3.

But it was in a subsequent case holden, that the court may grant a new trial, at the instance of the defendant, in an indictment or information without the consent of the king's counsel; and it is in this case said, that Mr. *Siderfin* is mistaken in his report of the case of *Read v. Dawson*.

Str. 1102.  
Rex v.  
Armstrong.

A new trial cannot be moved for, by the defendant in an indictment or an information, after an interlocutory judgment has been signed.

Str. 968.  
Rex v. Gib-  
son.

Upon a motion for a new trial, at the instance of the defendant, in an indictment for forgery, it was insisted, that it was not necessary for him to be present at making the motion; for that this case is different from the case of a motion in arrest of judgment. It was holden, that the defendant must be present when such motion is made. And by the court. The verdict fixes so great a suspicion of guilt upon the defendant, that the court will always be sure of him, before they intimate an opinion concerning the granting of a new trial; and the chief justice mentioned two cases, in which the distinction attempted to be made in this case had been over-ruled.

## Trover.

THE word *trover* is derived from the French word *trouver*, which signifies to find.

It is probable from the name of an action of *trover*, that it could not at its commencement be brought for the conversion of goods, unless they came to the defendant's possession by an actual finding: but whether this were so or not, it is at this day usual, to bring this action for the conversion of goods which came to the defendant's possession by a finding in law, as well as for the conversion of goods which came to his possession by an actual finding.

[As

[As the plaintiff in this action does not complain of the taking, but of the conversion; as he admits that the defendant *may* have come *lawfully* by the goods in question, it is immaterial by what means he alleges that possession to have been acquired. No doubt, from the name of the action, the surmise in the declaration most usually was, as it still is, that the defendant obtained the possession by *finding*. The gist of this action is the conversion of a chattel, the property of the plaintiff, of which he had, or at least was entitled to, the possession, at the time it came to the hands of the defendant. As the plaintiff insists upon his right of property in the thing in question, he must complain of the defendant's act as *tortious*; but if he complains of a *tort*, he must shew a possessory right in himself at the time that *tort* was committed; for no one can complain of a *tort*, who has no title to the possession. It is obvious, therefore, that a reversionary or expectant interest will not support the action, though either a general or a special property will be sufficient: for, if the interest be future or expectant, there can be no immediate right to the possession; but a special property ariseth merely from the actual possession, being in truth nothing more than a presumption of property which the law raiseth for the purpose of defending that possession, and which it will not suffer a wrong-doer to controvert; and where the possession is only parted with for a time, and in subserviency to the purposes of the person in whom the general or absolute property is vested, the right to the possession must necessarily remain in such person; or rather, the possession of the servant, for so we may consider the special proprietor, is in law the possession of the master or real owner. The action then being founded upon a conjunct right of property and possession, any act of a defendant which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shewn that he has applied it to his own use, though such be the allegation in the declaration. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use. Hence a re-delivery of the thing will not protect him from the action. Hence nothing can be pleaded in bar of it, but matter *dehors* or unconnected with the transaction; such as a release, former recovery, and perhaps the statute of limitations.]

Divers things relative to an action of *trover*, as tender and bringing money into court, damages and costs, have been treated of under the titles *Tender and bringing Money into Court*, *Damages* and *Costs*.

The remaining Matter, which appertains to this Title, shall be ranged in the following Order.

- (A) Of an Action of Trover in the general.
- (B) Of a Conversion.
- (C) Who may bring an Action of Trover.
- (D) For what Injuries an Action of Trover lies.
- (E) Against whom an Action of Trover may be brought.
- (F) Of the Pleadings in an Action of Trover.
  - 1. Of the Declaration.
  - 2. Of the Plea.

(G) Of Evidence in an Action of Trover.

(A) Of an Action of Trover in the general.

**I**F one person who has found the goods of another convert them, an action of trover lies.

2 Bulst. 313.  
Hac v.  
Clerk.

If one person who came to the possession of the goods of another by delivery convert them, an action of trover lies; for although there be not in such case an actual finding, there is a finding in law, which is sufficient to found this action upon.

Cro. Eliz.  
824. Bishop  
v. Lady  
Montague.  
Clayt 117.  
Cro. Ja. 50.  
Cro. Car. 89.  
1 Mod. 31.  
Str 128.

If the goods of *J. S.* have been taken by *J. N.* in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie; but *J. S.* can only recover in the latter action damages for the conversion of the goods; inasmuch as by electing to bring an action of trover, he waves his right to recover damages for the tortious taking.

2 Roll. Rep.  
447.  
Goodwin v.  
Farwood.

Wherever an action of trover lies, an action of detinue will likewise lie (*a*). But the latter action is very seldom brought; because the defendant may wage his law therein.

[*(a)* The converse of this proposition would be nearer the truth, namely, that trover lies where detinue will lie. In detinue the specifick chattel must be accurately described and traced; in trover this certainty in the description is not requisite: it is obvious, therefore, that trover may be brought where detinue could not be supported. The authority referred to, we may add, by no means establishes the author's proposition. See also 7 Term Rep. 12, 13.]

Cro. Ja. 130.  
4 Roll. Abr.  
5. [(b) It is  
not true  
that in deti-  
nue the

There is another reason for preferring an action of trover to one of detinue; namely, that in the latter action the plaintiff can only recover the goods in *specie* (*b*), whereas in the former he may recover damages for the conversion.

plaintiff can only recover the goods in *specie*: the judgment may be for the *value* of the specifick goods.  
Co. Entr. tit. Detinue.]

If the plaintiff in an action of trover have recovered damages for the conversion of goods, the property in the goods thereupon vests in the defendant; who, as damages to the value of the goods have been recovered against him, is to be considered as a purchaser.

Str. 1073.  
Adams v.  
Broughton.  
[Andr. 18.  
S. C. Kelw.  
58. b. S. P.  
per Frowicke.]

## (B) Of a Conversion.

**EVERY** assuming by one person, to dispose of the goods of another as if they were his own, is a conversion.

If *J. S.* take the goods of *J. N.* unlawfully, this is a conversion; such taking being a disposing of the goods as if they were the goods of *J. S.*

6 Mod. 212.  
Clayt. 112.  
1 Sid. 264.  
Bruen v.  
Roe. Clayt.  
112.

If one person dispose of the goods of another for the benefit of a third person, this is a conversion; for the injury to the owner of the goods is the same, as if they had been disposed of for the benefit of the disposer.

If the goods of *J. S.* are delivered to *J. N.* by a person not having a lawful authority to deliver them, and *J. N.* sell them, it is equally a conversion, as if *J. N.* had himself taken the goods.

Sayer, 41.  
Perkins v.  
Smith.

The severing of a thing from a freehold, as taking down the door of a house, is not a conversion; for a conversion can only be of a personal chattel.

*Ibid.*

But, if a thing which has been severed from a freehold be carried away; as, if *J. S.* carry away a tree the property of *J. N.* which was cut down by himself or by any other person, this is a conversion.

Cro. Ja. 123.  
Wood v.  
Smith.

If *J. S.* dig coals in a pit of *J. N.* and throw them out of the pit, he is guilty of a conversion; because, as the coals after being dug were a personal chattel, throwing them out of the pit was a disposing of them as if they were the coals of *J. S.*

Noy, 125.  
Skidnefs v.  
Hodson.

If *J. S.* who came to the possession of the goods of *J. N.* by finding, lose them, or they be taken from him, *J. S.* is not guilty of a conversion; because he does not in either case dispose of the goods as if they were his own.

1 Jo. 245.  
Player v.  
Roberts.

6. L. pl. 4. Bro. Detin pl 40.

If goods, in order to prevent a ship from sinking, are thrown by the master of the ship into the sea, this is not a conversion; because, so far from disposing of the goods as if they were his own, the master only does what is necessary for the preservation of the ship and the lives of the persons on board.

1 Leon 223.  
Vandrink v.  
Ar her.  
1 Robt. Abr.  
Detin pl 40.

2 Bulst. 280.  
Bird v.  
Aftcock.

If the goods of *J. S.* which were illegally taken by *J. N.* are retaken by *J. S.*, this is not a conversion; it being lawful for *J. S.* to retake the goods.

Bro. Trespo.  
pl. 323.  
Cro. Eliz.  
329.

If a stake-holder deliver money, deposited in his hands by *A.* on account of a wager, to *B.* who won the wager, this is not a conversion; for, as *B.* has won the wager, the stake-holder does no more than deliver his own money to *B.*

Cro. Eliz.  
870.  
Ledesham v.  
Lenham.

Yelv. 194.  
Gomerale  
v. Medgate.

Every unlawful intermeddling by one person with the goods of another is a conversion, it being a disposing *pro tanto* of the goods of another as if they were the goods of the intermeddler.

1 Roll. Abr.  
5. Countess  
of Rutland's  
case.  
6 Mod. 212.

If the horse of *J. S.* be taken and ridden by *J. N.*, this is a conversion, it being an unlawful intermeddling with the horse; [and a re-delivery to *J. N.* will only go in mitigation of damages.] [Bull. N. P. 46.]

*Per* Buller J.  
4 Term Rep.  
264.

[If one man, who is entrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion.]

*Ibid.*

If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge upon me.

Syeds v.  
Hay,  
4 Term Rep.  
260.

Where the owner of goods on board a vessel directed the captain not to land them on a particular wharf, to which the latter agreed at the time, but afterwards disobeyed the orders, and delivered the goods into the possession of the wharfinger, under an idea of the wharfinger's having a lien thereon for wharfage fees, this was adjudged a conversion, for by putting these goods on the wharf he brought a charge upon the owner.]

Cro Ja. 148.  
Bagshaw v.  
Gowd,  
Brownl. 5.

If *J. S.* who lawfully distrained a beast, work it, this is a conversion; because the working of the beast is an unlawful intermeddling therewith.

Cro. Ja. 148.  
Bagshaw v.  
Goward.

But, if *J. S.* after having lawfully distrained a milch cow belonging to *J. N.* milk it, this is not a conversion; for as milking the cow, which prevents it from being spoiled, is for the benefit of *J. N.* it is lawful to milk it.

2 Mod. 244.

If *J. S.* who lawfully distrained a beast, impound it in a proper pound, this is not a conversion; because he does nothing more than put the beast into the custody of the law.

Cro. Ja. 148.  
225.  
Yelv. 194.

If *J. S.* after having lawfully distrained goods for rent in arrear, had heretofore sold them, this would have been a conversion.

But by the 2 *W. & M. c. 5. § 1.* it is enacted, "That where goods are distrained for rent due upon a demise, lease, or contract, the person distraining may cause the goods to be sold."

1 Leon.  
224.  
Waldgrave  
v. Ogden.  
Cro. Eliz 219.

If a person, who found apparel, or to whom apparel was delivered to be kept, wear it, this is a conversion; the wearing of the apparel being an unlawful intermeddling therewith.

1 Leon.  
224.  
Waldgrave  
v. Ogden.  
Cro. Eliz.  
219. 2 Buller. 312.

But, if such apparel be eaten by moths; this, notwithstanding the injury was owing to negligence in keeping the apparel, is not a conversion; because the injury does not arise from a malfeasance.

Bro. Detin.  
Pl. 40.  
1 Leon.  
223, 224.

There is, indeed, some doubt whether an action upon the case does lie in such case against the person who found the apparel; for it is laid down in divers books, that the person, who came to the



the possession of the goods of another by finding, is not obliged to take so much care of them, as if he had come to the possession thereof by delivery. Owen, 141. Cro. Eliz 219.

But it is in one book laid down, that an action upon the case lies for negligence in keeping goods which were found; inasmuch as it is the duty of the finder of goods to keep them safely for the owner. 2 Bulstr. 312. Isaac v. Clark.

If the corn of *J. N.* be carried by *J. S.* to a mill, and the miller after being forbidden so to do by *J. N.* grind it, this is a conversion; the grinding of the corn being an unlawful intermeddling therewith. Clayt. 57. Holtworth's case.

If one man, after drawing part of the wine of another out of a vessel, put as much water into the vessel as he drew out wine, this is a conversion of all the wine; because the whole is thereby damaged, if not spoiled. Str. 576. Richardson v. Atkinson.

A master of a ship, who had contracted with a seaman to go a voyage, after the seaman came on board refused to pay him according to the contract. Hereupon the seaman desired to carry away some goods, which he had brought on board with him. The master would not permit him to do this, and said he should not carry them away until he had examined them, which he refused to do at that time. This was holden to be a conversion. 12 Mod. 344. Anon.

If *J. S.* who came to the possession of goods the property of *J. N.* by finding, do not absolutely refuse to deliver the goods to *J. N.* and only say, that he does not know whether *J. N.* be the owner of them, this is not a conversion. 2 Bulstr. 312. Isaac v. Clark.

A piece of timber the property of *J. S.* being in the field of *J. N.*, *J. S.* asked leave to fetch it away. *J. N.* refused to give leave; but never intermeddled therewith. It was holden, that, as *J. N.* never intermeddled with the piece of timber, his refusal of leave to fetch it away was not a conversion. 2 Bulstr. 310. Isaac v. Clark. 2 Mod. 245.

Upon the Custom-house key there is a hut, wherein certain porters lodge goods, until the ships, in which the goods are to be put on board, are ready to receive them. Every one of these porters has a cupboard in the hut for the separate use of himself. The plaintiff, who was one of these porters, put goods into the hut, which he laid in such a manner that the defendant, who was another of them, could not well come to his cupboard without removing them. The defendant, in order to come to his cupboard, removed the goods about a yard nearer to the door of the hut, and left them there. The goods being afterwards lost, the question was, Whether this removal of them amounted to a conversion? It was ruled that it did not. And by *Pratt*, Ch. J.—The plaintiff, by laying his goods in such manner as to prevent the defendant from coming to his cupboard, was a wrong-doer, and, consequently, it was lawful for the defendant to remove them. If an action upon the case had been brought, it would even then have been doubtful, whether the defendant was bound to return the goods to the place from whence he had removed them: but it is quite clear, that he is not guilty of a conversion; because the injury, if any, arose from a non-feasance. Str. 128. Bushel v. Miller.

1 Roll. Abr. 5. Isaac v. Clark.  
Hob. 187. 2 Show. 179. It is laid down in divers books, that if *J. S.* who came to the possession of the goods of *J. N.* by the delivery of *J. N.* refuse to deliver them to *J. N.*, this is only evidence of a conversion, and not an actual conversion.

Moor, 460. Cro. Car. 262. 6 Mod. 112. It is in other books laid down, that a refusal to deliver goods, to the person in whom the general property is, is an actual conversion; although the person, who refuses, came to the possession of the goods, by the delivery of the person in whom the general property is.

2 Mod. 244. 245. Mires v. Solehay. 10 Rep. 57. The question, whether there has been a conversion, is so entirely for the consideration of the jury, that the court cannot supply by intendment the want of its being expressly found by the verdict; for the court can never intend a person to have been a wrong-doer.

### (C) Who may bring an Action of Trover.

2 Term Rep. 756. 12. Term Rep. 12. **I**N order to maintain an action of trover, the plaintiff must prove that the goods in question were his property, and that *while they were so*, they came into the defendant's possession, who converted them to his own use. He must also shew, that he had at the time the actual possession, or at least a virtual possession of them; for if he had a right to the possession, it is implied by law.

Horwood v. Smith, 2 Term Rep. 150. Hence trover will not lie at the suit of the owner of stolen goods, which are *bonâ fide* sold in market overt before the conviction of the felon; for the property is thereby changed; and though conviction reverts the original ownership, yet cannot the owner even then maintain this action against one who was not in possession of them at the time of the conviction, notwithstanding he parted with the possession after notice from the owner of the felony.

Power v. Wells, Cowp. 818. Hence also this action will not lie for a horse which has been given in exchange for one that has turned out unsound.

Gordon v. Harper, 7 Term Rep. 9. From the want of the right of possession it was holden, that where goods leased as furniture with a house, had been wrongfully taken in execution by the sheriff, this action could not be maintained by the landlord against the sheriff, pending the lease.

Alexander v. Comber, 1 H. Bl. 20. Neither will it lie for goods sold without any earnest, delivery, or agreement in writing; the statute of frauds in such case preventing the property from vesting.]

Bro. Tresp. 71. 323. Latch. 214. 2 Buidr. 268. The person, in whom the general property in a personal chattel is, may maintain an action of trover for the conversion thereof, although he have never been in the actual possession thereof; because a general property in the case of a personal chattel draws to it a possession in law, and such possession is by reason of the transitory nature of a personal chattel sufficient to found this action upon.

Bro. Tresp. 71. 323. Latch. 214. If the person, in whom the general property in goods which lie at *York* is, give them to *J. S.* who is at *London* at the time of the

the gift, and before *J. S.* obtain the actual possession of the goods a stranger convert them, an action of trover lies; because *J. S.* acquired a general property in the goods by the gift.

But, if the giver of the goods had been an infant, *J. S.* Bro. Tresp. could not have maintained this action for the conversion thereof; pl. 150. because no person acquires a general property in goods by the gift of an infant.

If the bailee of goods give them to *J. S.* but do not deliver them, and a stranger convert the goods, an action of trover does not lie; because, as the goods were not delivered, *J. S.* did not acquire a general property in them by the gift of the bailee, who had only a special property therein. Bro. Tresp. pl. 216.

If goods, which were the property of a testator, are converted by a stranger before the testator's will is proved, and the person appointed executor afterwards prove the will, he may maintain an action of trover: for, although an executor have no property in the goods of his testator until he has proved his will, as soon as this is done, he acquires by relation a general property therein from the time of his testator's death. 2 Bull. 263. Fisher v. Young.

If a testator have bequeathed specifick goods, the legatee may maintain an action of trover for the conversion thereof by a stranger, although they have not been delivered to him by the executor; because a general property in the goods was vested in him immediately upon the death of the testator. Bro. Tresp. pl. 25.

But, if a testator have bequeathed a third part of his goods to *J. S.*, and before any of the testator's goods are delivered by his executor to *J. S.*, all the goods are converted by a stranger, *J. S.* cannot maintain this action; because, until his part thereof is ascertained by delivery of the executor, he has not a general property in any of the testator's goods. *Ibid.*

If wrecked goods are converted by a stranger, before they are seized by *J. S.* in whom the right of wreck is, *J. S.* may maintain an action of trover; a general property in the goods being vested in him. Fitz. N. B. 91. 6 Mod. S. 149.

It is in the general true, that if two persons are owners of a personal chattel, one of them cannot maintain an action of trover for the conversion thereof by a stranger. 3 Leon. 113. Nelthorpe v. Farrington.

But in order to encourage the building of ships, it has been holden, that the owner of an eighth, or any other part of a ship, may maintain this action for the conversion of such part by a stranger. Skin. 640. Dockwray v. Dickenson.

And it is said, that, that if a man bring this action against a stranger for the conversion of a whole ship, and it come out in evidence that only the sixteenth part thereof is his property, he may recover damages to the value of this part. *Ibid.*

*A.* seized in fee of land sold twenty trees thereon growing to *B.* and his assigns, which were to be set out by *A.* and felled by *B.* After *B.* had assigned his interest therein to *C.* *A.* set out the twenty trees, and *C.* felled them. The trees being afterwards taken away by *D.*, *C.* brought an action of trover. The action was holden to be maintainable; for that the interest of *B.*, which was said 5 Rep. 24. Palmer's case. [Cro. Eliz. 319. S. C. 3 Will. 335. 7, 8. S. C. cited and approved.]

said to be more than either a chose in action or a possible interest, was assignable.

Cro. Car.  
279.  
Waller v.  
Sands.

*A.* was tenant for life of land without impeachment of waste, except the waste were voluntary, with reversion to *B.* After *B.* had sold some trees growing upon the land to *C.*, *A.* cut down the trees and sold them to *D.*, who took them away. An action of trover being hereupon brought by *C.* it was holden, that the action did not lie; for that *B.* had not a power to sell trees growing upon the land during the life of *A.*

Pyne v. Dor,  
1 Term Rep.  
55.

[Trover is not maintainable by a tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon, and had been severed from the estate; for the tenant for life without impeachment of waste has a right to the trees the moment they are cut down.]

2 Buller 68.  
Hewell v.  
Ray. 1d.  
Paym 276.

If goods be delivered by *A.* to *B.*, in order that *B.* may deliver them to *C.*, and *B.* instead of delivering the goods convert them, *C.* may maintain an action of trover.

Cro. Eliz.  
870.  
Ledefham  
v. Lubram.

If two persons each stake a sum of money in the hands of a third person by way of wager, he who wins the wager may, in case the stake-holder refuse to deliver it, maintain an action of trover for the whole money.

1 Jon. 243.  
Plajer v.  
Roberts.

*A.* granted a lease of the coal mines already opened, or which should thereafter be opened, upon his manor of *B.* to *C.* for the term of ninety-nine years. During the term, *D.* the son of *A.* opened a mine in a copyhold estate belonging to *E.*, which was parcel of the manor, and dug and carried away coals. An action of trover being brought by *C.* for the conversion of the coals carried away, it was holden, that the action was maintainable.

2 Roll. Abr.  
569. P.  
Pl. 5.  
1 Sid. 438.

The person, in whom the general property in goods is, may in some cases maintain an action of trover for the conversion thereof by a stranger, although another person had at the time of the conversion a special property in the goods.

2 Roll. Abr.  
569. P.  
Pl. 5.

If goods which were bailed by *J. S.* to *J. N.* be lost by *J. N.* and be afterwards converted by a stranger, *J. S.* may by reason of his general property in the goods maintain an action of trover.

Bro. Tresp.  
pl. 216.  
pl. 295.

But, if the bailee of goods give them to a stranger and deliver them, the bailor cannot maintain this action; for by the gift and delivery of a person, who has a special property in and a possession in fact of the goods, the general property of the bailor is divested.

Salk. 289.  
Anon.  
Cro. Eliz.  
638.

If a servant, who had a general authority to receive and pay money for his master, give the money which he received of *J. N.* for the use of his master to *J. S.* and deliver it to him, the master may maintain an action of trover; because, as the servant had only an authority to receive the money, it must be intended that his possession was the possession of his master, and, consequently, he had not such a special property in the money, as enabled him to transfer the general property by a gift, notwithstanding there was a delivery.

It is in the general true, that wherever one person is answerable to another, in whom the general property is, for goods of which he had once a possession in fact, he has such a special property in the goods, as enables him to maintain an action of trover for the conversion of them by a stranger.

569. pl. 5. pl. 7. 1 Sid. 438.

Fitz. N. B.  
89. 92.  
1 Inst. 89.  
Bro. Tresp.  
pl. 83.  
4 Rep. 84.  
2 Roil. Abr.  
2 Saund. 47.

If *J. S.* have bailed a beast to *J. N.* for ploughing his land, and the beast be converted by a stranger, *J. N.* may maintain an action of trover; because, as the beast was delivered to *J. N.* for a purpose beneficial to himself, he is answerable for it to the bailor.

Bro. Tresp.  
pl. 92.  
Ld. Raym.  
913. 915.

If the goods taken by a sheriff in execution are converted by a stranger, the sheriff may maintain an action of trover; because he is answerable to the person for whom the goods were taken.

1 Sid. 438.  
Wilbraham  
v. Snow.  
1 Mod. 31.

If the goods of *J. S.* which were delivered to *J. N.* to be carried for hire, are converted by a stranger, *J. N.* may maintain an action of trover; because he is answerable to *J. S.*

2 Rep. 84.  
Salk. 26.  
145.  
1 Mod. 31.

The agistor of a beast may maintain an action of trover, for the conversion thereof by a stranger; because he is answerable to the owner of the beast.

Bro. Tresp.  
pl. 67.  
Moor, 543

Churchwardens may maintain an action of trover, for the conversion of goods belonging to their church by a stranger during their churchwardenship; because they are answerable to their successors.

Fitz. N. B.  
92.  
1 Ventr. 89.  
1 Mod. 65.

And it is said, that churchwardens may maintain this action, for the conversion of goods belonging to their church by a stranger during the churchwardenship of their predecessors.

Fitz. N. B.  
89. 92.

But it may be inferred from what is said in another book, that churchwardens cannot maintain this action, for the conversion of goods belonging to their church by a stranger during the churchwardenship of their predecessors.

Dyer, 48.

The finder of a jewel, although he do not acquire by the finding a general property therein, may maintain an action of trover against a stranger who converts it; because, as the finder is answerable for the jewel to the person in whom the general property is, he has a special property therein. He has moreover a right to the jewel as against every person, except the person who lost it.

Str. 505.  
Armory v.  
Delamire.

It was formerly holden, that if goods, which have been delivered generally to be kept, are converted by a stranger, the bailee may maintain an action of trover; because he is answerable for the goods to the person in whom the general property is: but that if goods, which have been delivered to be kept as the bailee keeps his own goods, are converted by a stranger, the bailee cannot maintain this action; because he is not answerable for the goods to the person in whom the general property is.

4 Rep. 84.  
Southcote's  
case.  
1 Inst. 89.

But in a modern case, in which *Southcote's* and all the old cases seem to have been well considered, this distinction is exploded; it being therein laid down, that the bailee of goods, which have been delivered

Ld. Raym.  
913. 914.  
915.  
Coggs v.  
Barraud.

delivered generally to be kept, is not answerable to the person in whom the general property is, for the conversion thereof by a stranger, unless the conversion be owing to some gross neglect of his; for that it would be very unreasonable, that a person, who receives no advantage from keeping the goods of another, should at all events be answerable for the conversion thereof.

It is upon the whole clear, that both the person in whom the general property in goods is, and the person in whom the special property therein is, may maintain an action of trover for the conversion thereof by a stranger.

2 Roll. Abr.  
569. P.  
Pl. 5.

But, if either of these has recovered damages for the conversion of the goods, this ousts the other of his right of action; for it would be very unreasonable, that a double satisfaction should be made for the conversion of the goods.

### (D) For what Injuries an Action of Trover lies.

Ld. Raym.  
146. Cham-  
berlain v.  
Hervey, Hil.  
8 W. 3.

IT has been holden, that a person cannot have such property in a negro in *England*, as will enable him to maintain an action of trover for converting the negro; and that he can only recover, as he may in the case of any other servant, damages for the loss of service.

Carth. 397.

It appears from another report of this case, that one question was, whether the baptism of the negro after the conversion did not amount to an emancipation, and consequently take away the plaintiff's right of action: but the court determined the case upon the general question, without giving an opinion as to this question.

Ld. Raym.  
1274.  
Smith v.  
Gould.  
Pasch. 5 Ann.

In a still later case it was holden, that a man cannot have such a property in a negro in *England*, as will enable him to maintain an action of trover for the conversion of the negro.

Bro. Tresp.  
pl. 213.

If the sheep of *J. N.* are mixed with the sheep of *J. S.* and the latter, in order to separate his sheep from those of *J. N.* chase the sheep of *J. N.* to the next place proper for separating them, an action of trover does not lie; because, as the sheep of *J. S.* cannot be easily separated from the sheep of *J. N.* without such chasing of the sheep of *J. N.* the chasing of them is lawful.

Fitz. N. B.  
86. Bro.  
Tresp.  
pl. 407.  
Hob. 283.

An action of trover lies for the conversion of a dog; for, a dog being a tame animal, property may as well be in a dog as in any other tame animal.

Cro. Eliz. 125. Cro. Ja. 463. [2 Bl. Rep. 1117.]

1 Freem.  
347. King  
v. Rose.  
4 Rep. 58.  
Cro. Car.  
254.

If *J. S.* be chasing the beast of *J. N.* with a little dog, in order to chase it out of land in his possession, and *J. N.* kill the dog, an action of trover lies; because, as *J. S.* had an election to chase the beast out of his land, or to distrain it damage-feasant, the chasing with such a dog is lawful.

1 Freem.  
347. King  
v. Rose.

But, if *J. S.* be chasing the beast of *J. N.* with a mastiff dog, in order to drive it out of land in his possession, and *J. N.* kill the

the dog, this action does not lie; because the chasing with such a dog is not lawful.

If the dog of *J. N.* which is found in the warren of *J. S.* be killed by *J. S.* this action does not lie; the killing of such dog by the owner of the warren being lawful. Cro. Ja. 45.  
1 Sid. 336.

It is in the general true, that an action of trover does not lie for the conversion of a beast or bird *feræ naturæ*; because there is not in the general any property in such beast or bird. Bro. Detin.  
Pl. 44.  
Dyer, 3c6.  
Cro. Car. 19. 545.

But, if a beast or bird *feræ naturæ* have been reclaimed, this action does lie for the conversion thereof; because there is a property in such beast or bird. Bro. Detin.  
Pl. 44.

And an action of trover sometimes lies for the conversion of a beast or bird *feræ naturæ*, although the beast or bird have not been reclaimed.

If a hare be killed by *J. N.* upon the land of *J. S.* an action of trover lies, although it have not been reclaimed; inasmuch as *J. S.* has by reason of its being upon his land a local property in the hare. Fitz. N. B.  
87.  
Godb. 123.  
Salk. 556.  
11 Mod. 75.

If a hare, which was found upon the land of *J. S.* be driven from thence, and afterwards killed by *J. N.* an action of trover does not in the general lie; for the property of *J. S.* which is only local, may be, and usually is, determined by driving the hare off his land. 5 Rep. 104.  
Boulton's case. Cro.  
Car. 554.

But, if *J. S.* immediately pursue the hare, which has been driven off his land and killed by *J. N.* this action lies; for by the immediate pursuit the local property is continued. Godb. 123.  
Salk. 556.  
1 Mod. 75.

An action of trover lies for the conversion of a beast or bird, which is valuable on account of its being merchandize, as a monkey or a parrot; although the beast or bird be *feræ naturæ*, and have not been reclaimed. Cro. Ja. 262.  
Grimes v. Shack.

An action of trover does not lie for the conversion of a record; because a record is not private property: but this action lies for the conversion of a copy of a record; the copy of a record being private property. Hardr. 111.  
Jones v. Winkworth.

It is in one case said, that an action of trover does not lie for money, unless it were in a bag at the time of the conversion. Cro. Eliz.  
661.  
Holiday v. Hicks.

But it is in other cases laid down, that, as the design of this action is not to recover a thing *in specie*, but to recover damages for the conversion thereof, it does lie for money, although it were not in a bag at the time of the conversion. 1 Roll. Abr.  
5. K. pl. 5.  
Cro. Eliz.  
841. Cro.  
Car. 89.

An action of trover lies for the conversion of money deposited as a wager. Cro. Eliz.  
870. Leeseham v. Lubram.

If a feme-covert lose the money of her husband at play, an action of trover lies. 1 Sid. 122.  
Key v. Stephens.

If goods pledged are not delivered, upon payment or tender of the money for which they were pledged, an action of trover lies. Cro. Ja. 144.  
Ratcliff v. Davis.

1 Barnard.  
431. Adams  
v. Hutton.

In an action of trover for barley it appeared, that the barley was delivered to the defendant to be made into malt. It was ruled, that the action did not lie, because the barley was delivered to be made into malt; but that, in case there had been a payment or tender of the money due for making the barley into malt, an action of trover would have lain for the malt.

MS. Rep.  
Saunders v.  
Vincent.  
Eait.  
31 G. 2.  
in B. R.

In an action of trover, brought by a widow against the vendee of goods sold by her son, it appeared in evidence, that the plaintiff had sixteen years before let her son into the possession of a farm at that time holden by her, together with the goods in question, which were at that time part of the stock of the farm; and that the son had ever since occupied the farm, and acted as owner of the goods. A verdict being found for the defendant upon this evidence, it was upon a motion for a new trial said, that as a transfer of the property in the goods from the mother to the son was not expressly proved, the verdict ought to have been for the plaintiff. A new trial was refused: And by the court—As the son had been so long in the possession of the goods, it ought to be presumed the property was in him. It would moreover be extremely hard, if a purchaser for a valuable consideration should lose his money by the setting up of property in the mother, after the property had so long been to all appearance in the son.

Bro. Tresp.  
pl. 364.  
2 Roll. Abr.  
352. O. pl. 3. pl. 9. Carth. 381.

If a sheriff's officer, having a writ of *fieri facias* to take the goods of *J. N.* take the goods of *J. S.* an action of trover lies.

Carth. 381.  
Hallet v.  
Burr.

An action of trover does not lie for taking the goods of *J. S.* which a sheriff's officer has taken under a writ of replevin upon a presumption that they were the goods of *J. N.*, because this writ is different from a writ of *fieri facias*. By the former the officer is empowered to take certain goods therein specified; by the latter he is only empowered to take the goods of a certain person. But, if *J. S.* claim a property in the goods at the time of taking them, and the officer afterwards carry them away, without having the property determined under a writ *de proprietate probanda*, this action does lie.

Ld. Raym.  
736.  
Rex v.  
Woodward.

It was ruled by *Holt*, Ch. J. that if a sheriff, who is empowered by an extent to seize the goods of *J. N.* seize the goods of *J. S.* an action of trover does not lie; because by the seizure the property in the goods is vested in the crown.

Ld. Raym.  
336.  
Elkins v.  
Smith.

If seized goods are condemned by a court having jurisdiction in the matter, an action of trover does not lie; the property in the goods being by the condemnation vested in the crown.

Bunb. 67.  
Erick's  
case.

It is in one case laid down, that if seized goods are lodged in the Custom-house an action of trover does not lie, although there be afterwards a verdict for the claimer of the goods.

[The doctrine which is here delivered in an unqualified manner was merely the opinion of the Lord Chief Baron Bury at nisi prius; though it must be acknowledged, that in the discussion of the next case, namely, *Israei's case*, which seems indeed to be the same with this, the rest of the court concurred in that opinion. However, these cases were both fully considered, and over-ruled in *Tinkler v. Poole*, 5 Burr. 2657. where it was holden, that trover would lie against a custom-house officer for seizing goods not liable to seizure.



seizure. So, recognizing this case of *Tinkler v. Poole*, Lord Kenyon held, where it appeared that a distress for rent made under the assignee of a bankrupt was not legally made, because he was not the legal assignee, the petitioning creditor's debt not having accrued till after the bankruptcy, that trover might be maintained against the person who illegally made the distress, 6 Term Rep. 298. Such was the judgment of the court, as reported in that case. But there is manifestly a little inaccuracy in the report, as from the state of the case, the assignee himself was the defendant; whereas the noble judge considers the officer who made the distress under the assignee as the defendant; and the point in the case of *Tinkler v. Poole*, upon which case his Lordship relies, was, whether trover was maintainable against the officer.]

But it is laid down in another case, that the owner of the goods may in such case maintain an action of trespass, or an action upon the case. Bunb 80. Israel's case.

It is laid down, that if *J. S.* take goods of *J. N.* in order to prevent them from being stolen or damaged, an action of trover lies; because the loss would not, if either of these things had happened, have been irreparable. But, if *J. S.* take goods of *J. N.* which are in danger of being destroyed by fire or otherwise, in order to preserve them, this action does not lie, because the loss would, in such case, have been irreparable. Bro. Trespass. pl. 213.

An action of trover does not lie for the conversion of goods, for which an appeal of robbery has been brought; because a person, who has by bringing the appeal affirmed the taking to have been felonious, shall not afterwards be received to say that it was only a conversion. 1 Jon. 148. 150. Markham v. Cobb. Latch. 144. S. C.

It has been holden in one case, that if *J. S.* have been convicted or attainted of taking the goods of *J. N.* feloniously, *J. N.* cannot, provided he did himself give evidence, or procure any person to give evidence against *J. S.*, maintain an action of trover; because he is in either case entitled under the 21 H. 8. c. 11. to restitution of the goods. 1 Jon. 147. 150. Markham v. Cobb. Pasch. 1 Car. 1. Latch. 144. S. C. Noy, 82. S. C.

It is laid down in a subsequent case, that an action of trover does lie in such case; for that, as the party robbed has done his duty to the publick in prosecuting the thief, he ought not to be deprived of the remedy by an action of trover for the injury to himself. 2 Roll. Abr. 557. Y. pl. 24. Dawkes v. Cavenah. Mich. 1652.

The reason given in the latter case is by no means conclusive; for what purpose would it answer, that a person robbed should be at liberty to bring an action of trover, when he has a speedier remedy under the statute? [However, as the owner, after conviction of the felon, has a right to re-

stitution of the goods in specie, it should seem, that he would be entitled to recover damages in trover against any person, who is seized with the goods at that time, and refuses to deliver them; for then t. 1: goods are converted to the prejudice of the owner. Horwood v. Smith, 2 Term Rep. 755.]

It is said in one book, that an action of trover does not lie, after the person who took the goods has been indicted of felony and acquitted; for that, as *omne majus trahit ad se minus*, the conversion is merged in the felony. Bro. Trespass. pl. 415.

But in other books it is laid down, that if *J. S.* have been acquitted upon an indictment for feloniously taking the goods of *J. N.*, an action of trover lies; because, as the taking does not in this case appear to have been felonious, it is reasonable, that *J. N.* should recover damages for the conversion of his goods. 1 Jon. 150. Markham v. Cobb. Latch. 144. Noy, 82. Sty. 346.

Parker v.  
Patrick,  
5 Term Rep.  
175.

[Where goods were obtained from a person by fraud, and afterwards pawned to another without notice, and the owner prosecuted the offender to conviction, and got possession of his goods, it was holden, that the pawnee might maintain trover for them. The court said, that this was distinguishable from the case of felony; for there by a positive statute, the owner, if he prosecutes the offender to conviction, is entitled to restitution: but that does not extend to this case, where the goods were obtained by fraud.]

1 Leon. 223.  
Vandrink v.  
Archer.  
[*Vide sup.*]

An action of trover does not lie for the conversion of goods bought in market overt, although they were stolen; for by the sale in market overt the property in the goods was vested in the vendee.

MS. Rep.  
Miller v.  
Race, Hil.  
31 G. 2.  
in B. R.  
[1 Burr.  
452. S. C.]

A. who came to the possession of a bank note the property of B. by robbing the mail, parted with it to C. for a valuable consideration. Payment of the note being afterwards refused at the Bank, C. brought an action of trover against the cashier of the Bank who had signed it. Upon a case reserved it was holden, that the action was maintainable: and by Lord Mansfield, Ch. J., if a man did not in every case acquire a property in a Bank note by giving a valuable consideration for it, an end would soon be put to the circulation of Bank notes.

2 Roll. Abr.  
5 L. pl. 1.  
1 Leon. 223.  
6 Mod. 252.

An action of trover lies, although the goods converted be afterwards restored to the owner; for the restoration only goes in mitigation of damages.

## (E) Against whom an Action of Trover may be brought.

Bro. Tresp.  
pl. 92.

IF J. S. take away a beast, which he had bailed to J. N. for a time certain, before the expiration of the time, he is not liable to an action of trover; for the person, who has only a special property in a personal chattel, can never maintain this action against the person in whom the general property is; the remedy of the bailee being an action upon the case.

Bro. Tresp.  
pl. 295.  
5 Rep. 14.  
Cro. Eliz.  
784.

If J. S. kill the beast of J. N., which was bailed to him generally, an action of trover does not lie against J. S., for by the bailment a general confidence was placed in him; and the remedy for an abuse of such confidence is an action upon the case.

1 Inst. 57.  
Bro. Tresp.  
pl. 295.  
5 Rep. 13.  
Cro. Eliz.  
780.

But, if J. S. kill the beast of J. N., which was bailed to him for a particular purpose, as to plough his land, he is liable to this action; because a general confidence was not placed in him by the bailment.

1 Leon. 87.  
Glossé v.  
Hayman.

If a servant, who was trusted to sell the goods of his master, carry them away, an action of trover lies against him; inasmuch as the confidence placed in him extended only to selling the goods.

Bro. Tresp.  
pl. 271.

If a servant, who has by the command of his master lawfully distrained a horse, use it, the servant is liable to an action of

trover.

trover; because the command did not extend to the using of the horse.

*A.* pawned goods to *B.* who was known to be a servant employed by *C.* a pawnbroker in the way of his trade. *A.* afterwards tendered to *B.* the money due upon the goods, and demanded the goods. *B.* did not deliver them, but said they were sold. It was ruled by *Holt, Ch. J.* that an action of trover lay against *C.*

It is laid down in one case, that an action of trover does not lie against a servant, for an unlawful intermeddling with the goods of any person by the command of his master, unless the intermeddling be such as amounts to a trespass; because the master is in such case answerable. It is moreover said, that it would be very inconvenient, if it should be always necessary for a servant to be satisfied of his master's right to goods, before he obeys his command as to the intermeddling therewith.

But it is laid down in another case, that if a servant unlawfully intermeddle with the goods of any person, the servant, although it be by the command of his master, is liable to an action of trover; for that the command of a master neither justifies nor excuses his servant in doing a tortious act.

It is said to have been holden, that if a sheriff, who has seized goods under a writ of *feri facias*, sell them, after he is out of his office, he is liable to an action of trover. But from two other reports of the same case it appears to have been holden, that this action would not lie in such case against the sheriff. And in another book, wherein the case is cited, it is said, that *Yelverton* is mistaken in his report; for that upon examining the roll it appeared to have been determined as it is reported by *Moor* and *Croke*.

It has been holden, that an action of trover lies against a sheriff for selling, after an assignment by the commissioners, the goods of a bankrupt, which had been seized by him under a writ of *feri facias* after the act of bankruptcy: and by Lord Mansfield, Ch. J.—The sheriff was not liable to this action for seizing the goods (*a*), inasmuch as he might be ignorant of the act of bankruptcy; but the sale of them after the assignment by the commissioners, of which he was bound to take notice, was a conversion.

*trespass* for seizing the goods. *Smith v. Miller*, 1 Term

*J. S.* the plaintiff, in an action against *J. N.*, had received of a sheriff the money, for which the goods of *J. N.*, seized under a writ of *feri facias* after he had committed an act of bankruptcy, had been sold. It was holden, that an action of trover lay against *J. S.*, without making the sheriff a defendant.

If a stranger have officiously assisted a sheriff or his officer in the execution of a writ of *feri facias*, which issued upon a regular judgment, he is not liable to an action of trover; for it is not only lawful, but it is the duty of every man to assist in the execution of such writ.

Ld. Raym.  
738. *Jones*  
*v. Hart*.  
Salk. 441.

2 Mod 244.  
Mires v.  
Solebay.

Sayer, 41.  
Perkins assignee of  
Hughes v.  
Smith.  
[1 Will.  
328.]

Yelv. 44.  
Ayer v.  
Aden.  
Moor, 757.  
Cro. Ja. 53.  
2 Saund 47.  
Wilbraham  
v. Snow.

MS. Rep:  
Cooper v.  
Chitty,  
Mich.  
30 G. 2.  
in B. R.  
[1 Burr. 20.  
S. C.  
(a) The  
sheriff was  
not liable to  
an action of  
trover.]

Str. 996.  
Rush assignee of  
Ryland v.  
Baker.  
[Bull. N. P.  
21.]

10 Mod. 24.  
Temple-  
man's case.

12 Mod.  
173.  
Britton v.  
Cole.  
2 Jon. 114.

An action of trover does not lie against a sheriff or his officer, or against any person, who by the command of either of these assists in the execution of a writ of *feri facias*, although there were no judgment to warrant the issuing of the writ; for neither of these has done more than obey the writ, which it was the duty of every one of them to do.

12 Mod.  
179.  
Britton v.  
Cole.  
Carth. 445.

But, if a stranger have officiously assisted a sheriff or his officer in the execution of such writ, he is liable to this action; for, as he acted officiously, it was incumbent upon him to take care, that there was a judgment to warrant the issuing of the writ.

Str. 509.  
Phillips v.  
Biron.  
Raym. 73.

An action of trover does not lie against a sheriff or his officer, or against any person, who by the command of either of these assists in the execution of a writ of *feri facias*, although the judgment upon which the writ issued were irregular; because the fault in such case is in the court, or some officer of the court. But, if a stranger have officiously assisted a sheriff or his officer in the execution of such writ, he is liable to this action; for, as he acted officiously, it was incumbent upon him to take care that the judgment was regular.

Stevens v.  
Evans.  
2 Burr.  
1152.

[An action of trover will lie against persons distraining goods for a poor's rate, in the hands of the representatives of the person liable to pay it, if no previous demand has been made upon the representatives.]

Salk. 283.  
Ford v.  
Hopkins.

It appeared in evidence, that the plaintiff had left some lottery tickets with a goldsmith, in order to receive the money due upon them for the use of the plaintiff; that a certain number of tickets in the same lottery had been left by the defendant with the goldsmith, who gave the defendant a note to deliver the same number of tickets to him; and that the goldsmith afterwards delivered as many of the plaintiff's tickets to the defendant as were mentioned in the note. It was holden, that an action of trover lay against the defendant for the conversion of these tickets. And by the court—The lottery tickets being left with the goldsmith for the special purpose of receiving the money thereupon due for the plaintiff's use, he had no power to dispose of them; and, consequently, as the property was not changed by the delivery of the tickets to the defendant, he is liable to this action.

Str. 1187.  
Hartop v.  
Hoare.

In a special verdict it was stated, that J. S. the owner of jewels, had bailed them sealed up in a bag to a banker for safe custody only; that the banker broke open the seal, took the jewels out of the bag, and pawned them to J. N. for three hundred pounds. It was holden, that an action of trover lay against J. N. for the conversion of the jewels. And by the court—The plaintiff's jewels being delivered to the banker for safe custody only, his breaking open the bag and taking them out was a trespass; and consequently the defendant, although he came honestly to the possession of the jewels, is liable to this action: because they were delivered to him by a person who had no property in them.

Str. 813.  
Parker v.  
Godin.

The wife of a bankrupt delivered some plate, left with her by her husband at the time of his absconding, to a servant, that he might

might borrow money thereupon. The servant went with the plate to the door of a banker's shop, and there delivered it to the defendant, who went into the shop and pawned it in his own name, and immediately went back to the wife and delivered the money to her. It was holden, that, as neither the wife nor the servant had a power of disposing of the plate, this was a conversion in the defendant, for which he was liable to answer to the assignees of the husband.

[But, where a bankrupt's wife brought money of the bankrupt to the defendant, who purchased *India* and *South Sea* bonds with it, some of which the assignee seized, and accepted as part of the bankrupt's estate; it was adjudged, that the assignee could not maintain trover for the money paid for the others, since he could not avow the act of purchasing as to part, and disavow it as to the rest; assent to the act at one moment, and complain of it as tortious at another.]

doubted, whether the purchase of the bonds was a conversion under the circumstances of this case.

It is laid down, that if *A.* take the goods of *B.* illegally, and *C.* afterwards take them illegally from *A.*, *P.* cannot maintain an action of trover against *C.*; for that, by the first taking, notwithstanding it was a tortious one, the property of *B.* was divested.

But it is said in one book, that *A.* does not in such case acquire any property in the goods by the first taking, and, consequently, that *B.* may maintain an action of trover against *C.*

If a factor, who has sold the corn of *J. S.* and received the money for it, refuse to pay the money to *J. S.*, an action of trover lies against him.

A servant, who had a general authority to receive and pay money for his master, after receiving some money due to his master from *J. N.*, gave it to *J. S.*, and delivered it to him. It was ruled, that an action of trover lay for the master against *J. S.*; and by *Holt*, Ch. J.—As the receipt of the servant was a discharge to *J. N.*, the money was received to the use of the master; and consequently the possession of the servant must be intended to have been the possession of the master.

If a carrier, to whom goods have been delivered to be carried, be robbed of the goods, or lose them through negligence, he is liable to an action upon the case; but an action of trover does not lie against him; because he has not in either case been guilty of a malfeasance.

But, if a carrier, to whom goods have been delivered to be carried, sell the goods, or refuse to deliver them upon the money due for carriage being paid or tendered, an action of trover lies against him.

It is said to have been ruled by *Holt*, Ch. J. that if the goods delivered to be carried were not delivered to the carrier himself, but to his book-keeper, an action of trover does not lie against the carrier, unless the goods be afterwards converted by him.

Wilson v. Poulter, 2 Str. 859.  
1 Barnard. 77. 113.  
136. 142.  
284. S. C.  
In the latter book, the court are said to have

Bro. Tresp. pl. 256.  
pl. 329.  
pl. 359.

1 Sid. 438.

Cro. Eliz. 638.  
Holiday v. Hickee.

Salk. 289.  
Anon.  
Cro. Eliz. 638.

1 Roll. Abr. 2. pl. 1.  
pl. 2. pl. 3.  
Hob. 17.  
Cro. Ja. 330.  
Salk. 143.  
12 Mod. 482.

Salk. 655.  
Anon.

Ld. Raym. 792. Anon.  
Trin. 1 Ann.

2 Barnard.  
234. Harvey  
v. Syllard,  
Hil. 6 G. 2.

Sk'n. 635.  
Middleton  
v. Forder.

Salk. 554.  
Hartford v.  
Jones.

2 Show. 161.  
179.  
1. d. Raym.  
808.

1. d. Raym.  
868. Yorkv.  
Greenaugh.

1. d. Raym.  
267. Yorkv.  
Greenaugh.

Yelv. 67.

Hob. 40.  
Cooper v.  
Andrews.

But the contrary was ruled in a subsequent case. In an action of trover against a book-keeper it appeared, that goods were delivered to him to be carried by his master's waggon. It was holden, that the carrier himself is in such case liable to answer for the conversion of the goods.

And the latter case agrees with what is laid down in another case. In an action of trover against a master of a hackney coach it appeared, that the goods were delivered to his servant who drove the coach; and the question was, if the master was answerable for the conversion of them? It was ruled that he was not: and by *Holt*, Ch. J.—It would be hard if the master of a hackney coach, who is not paid for the carriage of goods, should be answerable for the conversion of them. There is a wide difference betwixt the case of a hackney coach and that of a stage coach. If a passenger in a stage coach, who is allowed to carry goods of a certain weight, deliver goods not exceeding that weight to the driver of the coach, the master of the coach is answerable for them; because the money he receives is paid for the carriage of the goods as well as of the passenger. It has been holden, even in the case of a stage coach, that if a passenger carry goods of a greater weight than he is allowed to carry, the master of the coach is not answerable for the over weight, unless it be paid for.

An action of trover does not lie against a carrier for refusing to deliver goods, unless the money due for the carriage have been paid or tendered; because, as a carrier is by law bound to carry the goods delivered to him, it is highly reasonable, that he should have a right to detain them, until the money due for the carriage is paid or tendered.

An action of trover does not lie against an innkeeper for detaining the horse of his guest, unless the money due for keeping the horse have been paid or tendered: for, as an innkeeper is by law bound to receive the horse of a traveller, in case his stable be not full, it is very reasonable, that he should be paid for keeping the horse before it is taken away.

It was holden by three judges, contrary to the opinion of *Holt*, Ch. J. that an innkeeper may detain a horse, although the man who put the horse into the stable have not lodged in his house; for that the putting up of his horse, from which the innkeeper has a profit, makes the man a guest.

If a stolen horse be put up at an inn, an action of trover does not lie against the innkeeper for detaining the horse from the owner, unless the money due for keeping the horse have been paid or tendered; because the innkeeper was bound to receive the horse, and it was impossible for him to know whether his guest came honestly by it.

An action of trover does not lie against a farrier, for refusing to deliver a horse which has been shod by him, unless the money due for the shoeing have been paid or tendered.

A taylor is not liable to an action of trover, for refusing to deliver a coat made by him to the person from whom he received the

the materials for it, unless the money due for making the coat have been paid or tendered.

It was decreed by *Strange*, Master of the Rolls, that a factor, who had paid money for insuring the goods of his principal, and had been at other expence concerning them, had such a lien upon the goods, that a court of equity would not oblige him to deliver them, before the money due was paid or tendered. The factor, not being satisfied with this decree, appealed to the Chancellour; and the appeal came on before Lord *Hardwicke* in *February* 1755. His lordship, after taking time to consider, and sending for some merchants to inform himself of the nature of a factor's business, decreed, that a factor has a lien upon the goods of his principal, so long as the goods continue in his possession, not only for what is due for his trouble and expence concerning them, but also for all money due to him from his principal.

Another decree to the same effect was pronounced by Lord *Hardwicke* a few months after.

MS. Rep.  
Gardiner v.  
Wilcox.  
[1 Burr. 494.  
S. C.]

[So, in the case of packers, there being evidence, that it was usual for them to lend money to clothiers, and the cloths to be a pledge, not only for the work done in packing, but for the loan of money likewise; Lord *Hardwicke* held, that according to this usage, packers were in the nature of factors, and as such entitled to a lien upon the goods, not only for incidental charges, but as an item of *mutual account* for the general balance due to them.

MS. Rep.  
Gardiner v.  
Coleman. [1 Burr. 494. S. C.]

But it is otherwise, where goods are delivered to a tradesman or manufacturer for a particular purpose; as corn to a miller, to be ground, or cloth to a dyer to be dyed; for these have only a specific lien upon the goods for the price of grinding and dying.]

Ex parte  
Deeze,  
1 Atk. 228.  
Ex parte  
Dumas, Id.  
234.

An action of trover does not lie against the sayer of goods thrown on shore, which were part of the cargo of a ship that had been wrecked, unless a satisfaction have been made or tendered for the trouble or expence of saving them; it being highly reasonable, that the party who has saved goods, and has perhaps done it at the peril of his life, should have a lien upon the goods for his trouble or expence.

Ex parte  
Ockenden,  
1 Atk. 235.  
Green v.  
Farmer,  
4 Burr. 2214. 1 Bl. Rep. 651. S. C.

[But, where a quantity of timber, placed in a dock on the bank of a navigable river, was accidentally loosened, and carried by the tide to a considerable distance, and left at low water upon a towing path, where *A.* finding it, voluntarily conveyed it to a place of safety, beyond the reach of the tide at high water; it was determined, that the owner of the timber might maintain trover for it against *A.* without tendering any thing to him by way of compensation for the trouble and expence to which he had been put in the salvage.]

Ld. Raym.  
373. Hart-  
ford v. Jones.

The lord of a manor, who had seized a beast as an estray, was at the expence of keeping it some time after he had proclaimed it. Within a year and day after the proclamation the owner of the beast came and demanded it; but did not make or tender any sa-

Nicholson v.  
Chapman,  
2 H Bl. 259.

2 Roll. Abr.  
62. Taylor  
v. James,  
[Bull. N. P.  
45. S. C.]

tisfaction for the keeping. Upon the refusal of the lord to deliver the beast, an action of trover was brought against him. It was holden, that, as the owner of the beast had not made or tendered a satisfaction for the keeping, the action did not lie.

It was ruled by *Holt*. Ch. J. that if an attorney, who has been employed to draw and attend the execution of a deed, do not deliver it upon demand, an action of trover lies against him; for that as he may bring an action for the money due for drawing and attending the execution of the deed, he cannot detain it, although the money have neither been paid nor tendered.

Ld. Raym. 738. Anon.  
[It is now settled, that an attorney has a lien upon his client's papers, &c. *Vide supra*, tom. 1. pag. 303.]

Str. 651.  
Stone v.  
Lingwood.  
[Upon the argument of  
Green v.  
Farmer,  
4 Burr.  
2218. Lord  
Mansfield  
declared that  
this case was  
not law.]

The plaintiff, who was master of a ship, had brought home a small parcel of elephants teeth on his own account, and a large parcel upon the account of the defendant, who was the owner of the ship. The defendant entered both parcels at the custom-house, paid the duty for both, and both were delivered to him. Upon his refusing to deliver to the plaintiff his parcel, an action of trover was brought; and the question was, whether, as the plaintiff had neither paid nor tendered his part of the duty, the action could be maintained? It was ruled that it could; and by *Eyre* Ch. J. the defendant had no right to detain the plaintiff's parcel, notwithstanding the money paid by him as duty for it was neither paid nor tendered; for he might have brought an action for the money, or he may now give evidence of the money paid, and then it may be deducted out of the plaintiff's damages. The reporter adds, that the latter was done.

6 Mod. 212.  
Baldwin v.  
Cole.

A carpenter, after working some time in one of the queen's yards refused to work any longer. Hereupon the surveyor of the yard refused to let him take away his tools. An action of trover being brought against the surveyor, he gave in evidence an usage for the surveyors of the queen's yards to detain the tools of workmen, in order to compel them to continue working in the yards until the queen's work is finished. It was holden that the action lay; and no regard was paid by *Holt* Ch. J. before whom the cause was tried, to the usage.

4 Reil. Abr.  
92. M.  
pl. 2. pl. 6.  
Cro. Car.  
271.  
Yelv. 66.

If a person, who would otherwise have a right to detain the personal chattel of another, for the trouble or expence he has been at concerning it, contract to be paid a sum certain for the trouble or expence, he thereby waives the right of detaining the chattel.

Sayer, 224.  
Brenen v.  
Currant.

An agreement was entered into, whereby ten shillings and sixpence was to be paid to a farrier for curing a mare; and a reasonable sum for keeping the mare until she should be cured. The owner of the mare, as soon as she was cured, tendered ten shillings and sixpence, and demanded the mare. The farrier refused to deliver the mare, unless a gross sum was paid for the cure and keeping of the mare; and an action of trover was brought. It was holden, that the action lay: And by *Ryder* Ch. J.—As ten shillings and sixpence were tendered, the defendant had no right to detain the mare on account of the cure. It is not necessary to give



give any opinion, as to the right of a farrier to detain a beast for the money due for keeping it until it is cured ; because, if a farrier have in the general such right, it was in the present case waived by the special agreement to be paid a reasonable sum for the keeping.

[Trover is not maintainable against an executor for a conversion by his testator : the form of the plea is a decisive objection to it.] Hamblly v. Trotter, Cowp. 371.

## (F) Of the Pleadings in an Action of Trover.

### 1. Of the Declaration.

**I**N an action of trover for the conversion of letters patent, there was a verdict for the plaintiff. Upon a motion in arrest of judgment it was objected, that the plaintiff had not alleged in his declaration, that he was possessed of the letters patent as of his own proper goods. Judgment was given for the plaintiff : And by the court—The plaintiff has alleged, that the defendant knowing the letters patent to appertain to him did convert them, which implies they were the property of the plaintiff. The reporter indeed adds, that the objection was not allowed to be good ; because it was after a verdict. But it is not to be conceived, that the verdict could in such case make a difference ; for, if a property in the plaintiff had not been either expressly or impliedly alleged, the declaration would have been defective in a matter of substance, and consequently the defect would not have been cured by a verdict. Hardr. 111. Jones v. Winkworth.

But, if the action be in the court of Common Pleas, it is not necessary to allege in the count, that the goods were the property of the plaintiff, provided this be alleged in the writ ; because the writ is in that court parcel of the declaration. 1 Sid. 187. Jones v. Fritchard. Lutw. 1510.

It is not necessary for the plaintiff in an action of trover to shew in his declaration, in what manner his property in the goods was acquired. 2 Bullstr. 288. Willamore v. Barford.

If it appear in the declaration in an action of trover, that some of the goods were the property of the plaintiff at the time of the conversion, but this do not appear as to some other of the goods ; and judgment be entered up generally ; the judgment is erroneous : but, if the plaintiff, although the verdict be general, enter a *remittitur* as to the goods which do not appear to be his property, and enter up judgment as to the residue, the judgment is good. 2 Saund. 379. Pinkney's case.

The plaintiff in an action of trover alleged in his declaration, that he delivered the goods charged to have been converted to the defendant to be kept for him. It was objected, that the declaration was bad, because the plaintiff had not alleged a loss of the goods : but it was holden to be good. Cro. Eliz. 781. Gumbleton v. Grafton.

The personal chattel, for the conversion of which an action of trover is brought, must be described in the declaration with a degree of certainty : for if this be not done, the defendant would not

5 Rep. 34. Playter's case. 2 Inst. 435. Cro.

not

Eliz. 817. not know how to prepare for his defence; nor would he be able,  
 1 Ventr. 53. in case a second action should be brought for the conversion of  
 Salk. 628. the same chattel, to plead a recovery in the former action.  
 Ld. Raym. Str. 637.  
 588. 1410.

Cro. Eliz. But a less degree of certainty in describing the personal chattel  
 817. is sufficient in the declaration in an action of trover after a ver-  
 Wood v. dict than upon a demurrer; inasmuch as the court will after a  
 Smith. verdict intend that some defect of certainty in the declaration  
 12 Mod. 3. was supplied by evidence.  
 Ld. Raym. 518. 1410.

In order to form a judgment of the degree of certainty neces-  
 sary in describing the personal chattel for the conversion of which  
 an action of trover is brought, it will be proper to mention the  
 principal cases upon the point; which shall be ranged in order of  
 time as they were determined.

5 Rep. 34. The declaration in an action of trover, which charged the con-  
 Playter's version of some fish, without shewing the number or quality of  
 case. Mich. the fish, was after a verdict holden to be too uncertain.  
 35 Eliz.

Cro. Eliz. The declaration in an action of trover, which charged the  
 866. conversion of a parcel of fish called ling, was upon a writ of  
 Gramvel v. error holden to be bad, because the quantity of the fish was not  
 Robotham. shewn.  
 Mich.  
 43 Eliz.

2 Show. 433. The declaration in an action of trover, which charged the  
 Hawes v. conversion of seven pieces of linen cloth, was holden to be bad,  
 Randal. for want of shewing the number of yards the pieces contained;  
 East. 1 Ja. 1. for that the quantity of linen cloth contained in a piece is alto-  
 gether uncertain.

Cro. Ja. 664. In the declaration in an action of trover the conversion *uni-*  
 Bancroft v. *risci*, Anglicè *a trunk full of linen*, was charged, and there was a  
 Coe, Hil. verdict for the plaintiff with twenty pounds damages. Upon a  
 19 Ja. 1. motion in arrest of judgment, *Houghton*, J. was of opinion, that the  
 declaration was not certain enough: but *Lee*, Ch. J. *Dodderidge*, J.  
 and *Chamberlain*, J. were of opinion that it was; for that they  
 would intend the damages to have been given for the trunk alone,  
 and the plaintiff had judgment. A writ of error being brought,  
 the judgment was affirmed.

Mar. 60. The declaration in an action of trover, which charged the con-  
 Hodges v. version of two sheaves of corn, was holden to be bad; because  
 Simpson, the species of the corn was not shewn.  
 Mich.  
 15 Car. 1.

Sty. 25. The declaration in an action of trover, which charged the con-  
 Anon. version of a library of books, was holden to be certain enough;  
 Paich. although neither the number nor quality of the books was  
 23 Car. 1. shewn.

Sty. 199. The declaration in an action of trover which charged the con-  
 Graves v. version *sex parcellarum plumbi cinerei*, Anglicè *pewter porringers*, was  
 Drake, Hil. holden to be certain enough.  
 1 Car. 2.

In an action of trover the declaration, which charged the conversion of threericks of hay, was after a verdict holden to be certain enough; notwithstanding the quantity of the hay was not shewn. 1 Lev. 301. West v. Davis, Mich. 22 Car. 2.

The plaintiff in an action of *assumpsit* declared upon a *quantum meruit* for a parcel of thread. The declaration was upon a writ of error holden to be good. And by the court—This manner of declaring would not be certain enough in an action wherein a thing is to be recovered in specie: but it is so in this action, or in an action of trover, because only damages are to be recovered in these actions. 1 Lev. 303. Jenny v. Norris, Mich. 22 Car. 2.

The declaration in an action of trover, which charged the conversion of a ship, with guns and sails thereto belonging, was holden to be certain enough, although neither the number nor quality of the guns and sails was shewn; because these are to be considered as appertaining to the ship. Ld. Raym. 588. the case of Boroughs v. Hale there cited. Trin. 23 Car. 2.

The declaration in an action of trover, which charged the conversion of divers glass bottles, was after a verdict holden to be bad; because it did not shew the number of bottles. 2 Lev. 176. Hicks v. Pendarvis. Mich. 28 Car. 2.

The declaration in an action of trover, which charged the conversion of a parcel of woollen yarn, was upon a motion in arrest of judgment holden to be too uncertain. 2 Lev. 195. Wade v. Hatcher, Trin. 29 Car. 2.

The declaration in an action of trover, which charged the conversion of twenty bullocks and heifers, was upon a writ of error holden to be bad; because it did not shew how many beasts there were of each kind. 1 Ventr. 317. Davis v. Price, Mich. 29 Car. 2.

The declaration in an action of trover, after describing divers utensils therein charged to have been converted with sufficient certainty, contained these words, *cum aliis utensilibus*. The declaration was holden to be bad for want of shewing how many, and of what kind, the utensils comprehended under the words *aliis utensilibus* were. 3 Lev. 18. Blackhouse v. Moor. Pasch. 33 Car. 2.

The declaration in an action of trover, which charged the conversion of ten weights, was after a verdict holden to be certain enough; although it did not shew the quantity of the weights. 12 Mod. 3. Hook v. Galloway. Mich. 2 W. 3.

The declaration in an action of trover charged the conversion of seventy ounces of cloves, mace, and nutmegs, without shewing how many ounces there were of each, or that they were all mixed together. This declaration was holden to be certain enough: And by the court—We will intend, that it was one parcel of these three spices mixed together. Ld. Raym. 588. Hartford v. Jones. Trin. 12 W. 3.

The declaration in an action of trover, which charged the conversion of two bundles of flax, was upon a motion in arrest of judgment holden to be certain enough; although the quantity of flax was not shewn. Ld. Raym. 991. Thornton v. Barnard. Trin. 2 Ann.

The declaration in an action of trover, which charged the conversion of fifty pieces or ends of deal boards, was holden to be certain enough: but the reason given for its being so holden, namely, that 11 Mod. 66. Knight v. Barker. Mich. 4 Anne.

that an end of a board is amongst workmen well known to mean a short piece, shews, that the word piece, if it had stood alone, would not have been certain enough.

Str. 809.  
Anon. Trin.  
10 Anne. The declaration in an action of trover, which charged the conversion *diversorum mercimoniorum*, Anglice *earthen ware*, was holden to be too uncertain.

Str. 738.  
Radley v.  
Rudge. Hil.  
13 G. 1. The declaration in an action of trover, which charged the conversion of a piece of tape, was upon a motion in arrest of judgment holden to be certain enough; although it was not shewn how many yards the piece contained.

Ld. Raym.  
1529. Bot-  
tomley v.  
Harrison.  
Pasch.  
1 G. 2.  
[2 Str. 809.  
S. C.] The declaration in an action of trover, which charged the conversion of a parcel of packcloths, rappers, and cords, was upon a writ of error holden to be certain enough: And by the court—Courts of justice do not at this day require so much certainty, as they formerly did in the declaration in an action of trover. The word parcel, which is used in this case, ought to be taken to mean an entire thing, and the same as the word bundle. The cases upon this point are not all to be reconciled; but we are of opinion that the declaration is certain enough.

Str. 827.  
White v.  
Graham.  
Hil. 2 G. 2. The declaration in an action of trover, which charged the conversion of a parcel of diamonds, was holden by the court of Common Pleas to be certain enough. Upon a writ of error in the court of King's Bench it was said, that this case may well be distinguished from the case of *Bottomley v. Harrison*; for that in the latter case the word parcel was taken to mean an entire thing, and the same as the word bundle; but that in the present case, as every diamond is a distinct thing, the plaintiff ought to have shewn the number of diamonds. The judgment was affirmed; and a writ of error being afterwards brought in the House of Lords, it was affirmed there.

Str. 810.  
Haslegrave  
v. Thompson.  
Mich.  
4 G. 2. The declaration in an action of trover, which charged the conversion of fifty pieces of square timber, was upon a writ of error holden to be certain enough, although the quantity of timber which each piece, or which all the pieces contained, was not shewn.

2 Barn. 222.  
Hobbs v.  
Green. East.  
25 G. 2. The declaration in an action of trespass charged the taking away of divers quantities of china ware, earthen ware, and linen. In order to arrest the judgment it was said, that the declaration was bad; because it did not shew the particulars of either sort of goods. It was on the other side said, that a great degree of certainty is not required in the declaration in an action of trespass, or in an action of trover; because no more damages can be recovered in these actions than are proved to have been sustained. The declaration was holden to be certain enough.

Dyer, 306.  
Fine's case. In the declaration in an action of trover, for the conversion of a beast or bird *fera natura*, it must be shewn that the beast or bird was reclaimed; because, unless it were reclaimed, the plaintiff could not have any property therein.

Geo. Ja. 262.  
Wilson v.  
Chambers. If an action of trover be brought for the conversion of a bond, it is not necessary to recite any part of the bond in the declaration; for it may not be in the power of the plaintiff, who perhaps has

has not for some time been in possession of the bond, to recite any part thereof truly; and a misrecital would be fatal.

If the person, who has a special property in a bond, bring an action of trover for the conversion of the bond, he must allege in his declaration that it is *scriptum suum obligatorium*, in the same manner as the obligee himself must have done if the action had been brought by him; for, as the action is not brought for the conversion of the money due upon the bond, but for the conversion of the bond, the words *scriptum suum obligatorium* are necessary, in order to shew of what kind the writing is.

Ld. Raym.  
276. Arnold  
v. Jefferson.  
Salk. 654.

It is laid down in one book, that if an action of trover be brought for the conversion of a living chattel, it must be alleged in the declaration, that the chattel was of a certain price; and that if this action be brought for the conversion of a dead chattel, it must be alleged in the declaration, that the chattel was of a certain value.

Cro. Ja. 130.  
Wood v.  
Smith.

But it is in another book laid down, that, whether an action of trover be brought for the conversion of a living or dead chattel, it is quite indifferent which set of words, *of the price*, or *of the value*, are made use of in the declaration.

Fitz. N. B.  
83.

The value of the chattel, for the conversion of which an action of trover is brought, ought to be shewn in the declaration.

2 Roll. Rep.  
447. Good-  
win v. Harwood.

But the justices of the court of King's Bench were in one case divided in opinion, whether the want of shewing in the declaration in an action of trover the value of the chattel be not such a matter of form, as is after a verdict cured by the statutes of jeofails.

Cro. Ja. 130.  
Wood v.  
Smith.

It is the usual and the more proper way, for the plaintiff in an action of trover to alledge in his declaration, that the chattel came to the hands of the defendant by finding; but it is said, to be sufficient, to allege generally, that it came to the hands of the defendant.

2 Bulst. 313.  
Ifaac v.  
Clark.

The venue in an action of trover may be laid in *England*, for the conversion of a chattel in *Ireland*.

Salk. 290.  
Brown v.  
Hodges. 8 Mod. 322.

If the finding of the chattel, for the conversion of which an action of trover is brought, be in one county, and the conversion in another, the venue may be laid in either county; or, as this action is transitory, it may be laid in any other county.

It is not necessary to lay the venue in an action of trover at the place where the conversion was: but the declaration in such action is bad, unless some place be alleged; because, unless a conversion at a place certain be found by the jury, the plaintiff is not entitled to judgment.

Cro. Eliz.  
78. 98.  
2 Bulst. 313.  
Cro. Car.  
525.

It is in one case laid down, that, although the declaration in an action of trover allege the finding to have been at a place certain, if it do not expressly allege that the conversion was at a place certain, it is bad.

1 Roll. Rep.  
132. Mat-  
thew v.  
Stranfon.  
Mich. 26 Eliz.

But it is laid down in a subsequent case, that if the finding be alleged at a place certain, it is not necessary to allege that the conversion was at a place certain.

2 Bulst. 206.  
Atkins v.  
Wheeler.  
Pasch. 10 Ja. 1.

In

Cro. J3. 423.  
Tefmond v.  
Johnfon.

In the declaration in an action of trover it was alleged, that the chattel came to the defendant's hands by finding upon the fourth day of *May* in a certain year, and that afterwards, *ſcilicet* on the firſt day of *May* in the ſaid year, he converted the chattel. Upon a motion in arreſt of judgment it was ſaid, that this declaration is not good; becauſe the converſion is alleged to have been before the finding: but it was holden to be good: and by the court—As the words, that afterwards he converted the chattel, are a ſufficient allegation that the converſion was after the finding, that which is contained under the *ſcilicet* is repugnant to theſe words, and muſt be rejected as ſurpluſage.

## 2. Of the Plea.

Cro. Eliz.  
146. 434.  
Salk. 654.  
Ld. Raym.  
393.

The defendant in an action of trover cannot juſtify; becauſe the converſion muſt be confeſſed by a plea of juſtification; but the converſion is the tortious act, therefore cannot be juſtified.

Bro. Act.  
ſur le Cafe,  
pl. 109.

The defendant in an action of trover cannot plead, that the plaintiff was not poſſeſſed of the chattel charged to have been converted as of his own proper goods: nor is there any neceſſity for him to plead this; becauſe the plaintiff cannot recover unleſs he prove a property in himſelf.

Cro. Eliz.  
434.  
Aſcue v.  
Saunderson.

In an action of trover the defendant, a ſheriff, pleaded, that he had levied and ſold the goods under a *ſieri facias*, which is the ſame converſion, *abſque hoc* that he converted them *aliter vel alio modo*. This plea was holden to be bad: and by the court—The defendant ought to have pleaded not guilty, and might have given the matter pleaded in evidence.

Allen v.  
Harris.  
Lutw. 1538.

But it may be inferred from one caſe, that the defendant in an action of trover may plead the payment of money, before the action was brought, in ſatisfaction of the converſion.

Cro. Eliz.  
667.  
Ferrers v.  
Arden,  
Mich.  
40 Eliz.

The converſion of an ox, being charged in the declaration in an action of trover, the defendant pleaded, that the plaintiff had before brought an action of treſpaſs againſt J. S. and two others for the taking of an ox upon a day certain; that the defendants in that action pleaded in juſtification, that the taking was in right of the defendant in the preſent action; that upon a demurrer to this plea there was judgment for the defendants; that the plaintiff in the preſent action and in the former is the ſame perſon; that the ox charged to have been converted in the preſent action, and the ox charged to have been taken in the former action, is the ſame ox; that the converſion charged to have been committed by the defendant in the preſent action, if any have been, was committed by him together with the defendants in the former action; that the defendant in the preſent action was by covin not made a party to the former action; and that the defendants in the former action are by covin not made parties to the preſent action, which is brought for one and the ſame treſpaſs, thing and matter, as the former. The defendant concluded with praying judgment, whether, as there was judgment for the defendants

In the former action, the plaintiff ought to maintain the present action. Upon a demurrer to this plea, *Walmfley, J.* and *Kinsmill, J.* were of opinion that it is good; and by them; as the property in the ox was by the judgment in the former action determined to be in the present defendant, in whose right the defendants in that action justified, the plaintiff could not have maintained the present action against them; and it is not reasonable, that he should maintain it against the present defendant; because, although he were not a party to the record in the former action, he was a party to the trespass, and as such has a right to avail himself, in pleading to the present action, of any thing contained in that record. *Anderson, Ch. J.* and *Glanville, J.* agreed, that the present defendant may avail himself, in pleading to the present action, of any thing contained in the record of the former action: but they were nevertheless of opinion, that the plea is not good; and by them a judgment in an improper action can never be pleaded in bar to a proper action for the same cause. For instance, if *J. S.* who has delivered goods to *J. N.* to keep, bring an action of trespass against *J. N.* for taking the goods, and there be judgment against *J. S.*, he may, notwithstanding this judgment, maintain an action of detinue against *J. N.* for the goods; because the former action was misconceived. *Walmfley, J.* agreed, that if the defendant in an action of trespass for taking goods plead not guilty, and there be judgment for him, this judgment cannot be pleaded in bar of an action of trover for the conversion of the goods; because, for any thing that appears upon the record to the contrary, the action may have been misconceived: but, if a title to the goods be pleaded in the action of trespass, and there be judgment for the defendant, this judgment may be pleaded in bar of an action of trover for the conversion of the goods; because the property in the goods is thereby determined to be in the defendant. The reporter adds, that the cause was afterwards referred to arbitrators.

In another report of this case it is said to have been resolved, that a judgment in one personal action may in all cases be pleaded in bar to another personal action for the same cause. 6 Rep. 72.  
Ferrer's  
case.

The declaration in an action of trover charged the conversion of a hundred sheep on the thirtieth day of *April*, in the nineteenth year of the late king: the defendant pleaded not guilty as to eleven of the sheep; and as to the other eighty-nine, that the plaintiff had heretofore in an action of trespass declared against him for taking and driving away an hundred sheep on the fourteenth day of *April* in the same year; that to this action he pleaded not guilty as to eleven of the sheep, and as to the other eighty-nine he pleaded a recovery of sixty pounds, in an action of debt brought by him against *J. S.*; that *J. S.*, being possessed of eighty-nine sheep, they were levied by virtue of a writ of *feri facias* and sold to him; and that thereupon he took possession of the sheep; that issue being joined upon this plea there was a verdict for the plaintiff with two-pence damages; and that the plaintiff entered up judgment for the damages and his costs. Cro. Car. 35.  
Lacon v.  
Barnard.  
Pasch.  
2 Car. 1.

The

The defendant then averred, that the taking and driving away of eighty-nine sheep, for which the plaintiff recovered in the action of trespass, and the conversion of eighty-nine sheep charged in the present action, is the same trespass, thing, and matter; and that the judgment is still in force. To this plea the plaintiff replied, that true it is, that he did recover in the said action of trespass two-pence damages for the taking and driving away of the said eighty-nine sheep: but he averred, that the said two-pence damages were not assessed for the value of the said sheep; and that the defendant on the day mentioned in the declaration converted the said eighty-nine sheep. He then traversed, that the taking and driving away charged in the action of trespass, whereupon judgment was given, is the same trespass, *quoad* the conversion, whereof he now complains. Upon a demurrer to this replication there was judgment for the plaintiff; but the court were not unanimous in opinion. *Croke, J. Hutton, J., and Harvey, J.*, who were of opinion that the replication was good, said, that the damages given in the action of trespass were so small, that the court must intend them to have been given only for taking and driving away the sheep; for that, if it should be intended, they were given as a recompence for the sheep, the plaintiff would be deprived of his property in eighty-nine sheep, and have only two-pence for them. The court, rather than suffer so great a hardship, will intend, that the plaintiff had his sheep again; and that he lost them afterwards, and that the defendant found and converted them. It is moreover confessed in the present action by the demurrer, that the conversion was subsequent to the taking and driving away charged in the action of trespass; for the taking and driving away charged in that action, is alleged to have been upon the fourteenth day of *April*, in the nineteenth year of the late king; but the conversion, for which the present action is brought, is alleged to have been upon the thirtieth day of *April* in the same year. *Yelverton, J.* who was of opinion that the replication was bad, said, that as it is averred in the declaration in the action of trespass, that the defendant did take and drive away the sheep, this implies, that he ousted the plaintiff of his possession of the sheep and had them himself; and if this were so, the court ought now to intend, that the damages, although so very small, were given as a recompence for the sheep.

3 Mod. 2.  
Putt v.  
Rawlston,  
Mich.  
34 Car. 2.

In an action of trespass for taking goods, issue was joined upon the plea of not guilty; and there was a verdict and judgment for the defendant. The plaintiff in that action afterwards brought the present action of trover against the same defendant for the conversion of the same goods. The defendant pleaded the judgment in the former action in bar of the latter, and the question upon a demurrer was, Whether this plea be good? For the plaintiff the case of *Lacon and Barnard* was relied upon; and in answer to what is said to have been resolved in *Ferrar's* case, that a judgment in one personal action may in all cases be pleaded in bar to another personal action for the same cause, it was said, this can



can only be true as to two personal actions, in which the same evidence will be sufficient to maintain both: but that the evidence, which is in many cases sufficient to prove a conversion of goods, and, consequently, to maintain an action of trover, is not sufficient to maintain an action of trespass; because in the latter action the possession of the goods must be proved to have been tortiously obtained. It was further said, that the court may in the present case very well intend, that the plaintiff was mistaken in bringing an action of trespass; and if this were so, a judgment in an improper action can never be pleaded in bar of one that is proper. *Pemberton*, Ch. J., *Jones*, J., and *Raymond*, J., were of opinion that the plea is bad, and judgment was given for the plaintiff: but *Dolben*, J. very much doubted.

The conversion of ten pipes of wine being charged in the declaration in an action of trover, the defendant pleaded, that the plaintiff had heretofore in an action of trespass declared against him for taking and carrying away ten pipes of wine: that he had pleaded not guilty to the declaration in that action; and that upon a special verdict, which is set forth, there was a judgment for him. He then averred, that the goods, for the conversion of which the present action is brought, are the same goods for the taking and carrying away of which the former action was brought. Upon a demurrer to this plea it was said, that an action of trover will lie in many cases where an action of trespass will not, and the case of *Putt* and *Rauysfern* was relied upon. In answer to this it was said, that it appears in the present case, from the special verdict, in the action of trespass, which is set forth in the plea, that the judgment was upon the merits; whereas in the case of *Putt* and *Rauysfern*, as the verdict in the action of trespass was a general one, it could not appear that the verdict was not founded upon a mistake of the action. The justices were of opinion that the plea is good; but by reason of the judgment in the case of *Putt* and *Rauysfern*, and of the importunity of the plaintiff's counsel, leave was given to argue the case again.

In another report of this case it is said, that all the justices were of opinion, upon the authority of what is said to have been resolved in *Ferrer's* case, that the plea is good. The reporter adds, that *Pollexfen*, Ch. J. said, he had never been satisfied with the judgment in *Putt* and *Rauysfern*, which upon the bringing of a writ of error was, as he well remembered, agreed; for that he saw no difference betwixt that case wherein the judgment pleaded was given upon a general verdict, and the present case, wherein the judgment pleaded was given upon a special verdict.

It has been holden, that if *J. S.*, after converting the goods of *J. N.*, sell them, *J. N.* may recover the money for which they were sold in an action of *assumpsit* against *J. S.*; and that if *J. N.* afterwards bring an action of trover for the conversion of the goods, *J. S.* may plead the judgment in the action of *assumpsit* in bar of the action of trover.

[The statute of limitations may be pleaded to an action of trover.

2 Ventr 170.  
Lechmere v.  
Tooplady,  
Pasch.  
2 W. 3.

1 Show. 146.

Ld Raym.  
1217.  
Laine v.  
Dorel.

Cio. Car.  
245.  
1 Lutw. 99.

Parker v.  
Norton,  
6 Term Rep.  
695.

The bankruptcy of the defendant is no bar to an action of trover, though the conversion happened before the bankruptcy.]

### (G) Of Evidence in an Action of Trover.

**I**T is incumbent upon the plaintiff in an action of trover to prove, that he had a property in the chattel for the conversion of which the action is brought, and that he was possessed thereof at the time of the conversion.

Moor, 841.  
Isaac v.  
Clerk.

It is necessary for the plaintiff in an action of trover to prove, that the chattel came to the hands of the defendant. But it is not necessary for him to prove, in what manner it did come to the defendant's hands; the conversion being the gist of an action of trover.

1 Sid. 264.  
Bruen v.  
Roe.

If the defendant in an action of trover came to the possession of the chattel by a tortious taking, it is not necessary for the plaintiff to prove a refusal to deliver it; for the tortious taking is in itself a conversion.

Moor, 460.  
Cro. Car.  
262.  
6 Mod. 212.

But, if the defendant came to the possession of the chattel by finding, or in any other lawful way, it is necessary for the plaintiff to prove a refusal to deliver it.

Ante, 258.

If the defendant in an action of trover, who came to the possession of the chattel, by finding, or in any other lawful way, have intermeddled unlawfully therewith, it is not necessary for the plaintiff to prove a refusal to deliver it; for the unlawful intermeddling is, as has been already shewn, a conversion.

1 Roll. Abr.  
5. P. pl. 3.  
Hob 137.  
2 Show. 179.  
Salk. 655.

It is in the general true, that evidence of a refusal to deliver the chattel for the conversion of which an action of trover is brought, is evidence of a conversion. But such evidence is not in every case evidence of a conversion.

2 Bullst 310.  
Isaac v.  
Clerk.  
2 Mod. 245.

Although it be proved, that the defendant in an action of trover refused to deliver the piece of timber which lies upon his land; yet if it be proved, that the defendant never intermeddled with the piece of timber, evidence of a refusal to deliver it is not evidence of a conversion, inasmuch as the defendant is not in such case guilty of a malfeasance.

1 Roll. Abr.  
6. pl. 4.  
Salk. 655.

If it appear, that the chattel was lost by the defendant, or that he was robbed thereof, before it was demanded, evidence of a refusal to deliver it is not evidence of a conversion; for it would be very hard to punish the defendant as a wrong-doer, because he did not deliver a chattel, which was not in his power at the time the demand was made: but it is in such case necessary for the defendant to prove that the chattel was lost, or that he was robbed thereof before the demand was made.

Ante, 26.

If the defendant in an action of trover had a right to detain the chattel until a certain sum of money was paid, evidence of a refusal to deliver the chattel is not evidence of a conversion, unless the money were paid or tendered before a demand thereof was made.

In an action of trover by an administrator he declared for the finding and conversion of the rum of his intestate. The evidence was, that the rum was taken by the defendant during the life of the intestate; but that it was not made use of by the defendant until the intestate was dead. This evidence was holden to be sufficient to maintain the action: and by the court—As the plaintiff was ignorant of the time of using the rum, the defendant ought, if he would avail himself thereof, to have disclosed this in his plea; but if he had done it, the evidence, of his taking the rum during the life of the intestate and keeping it until his death, would have been sufficient to maintain the action.

Str. 60.  
Croft*er* v.  
Ogilby.

[In an action of trover for rushes, the plaintiff proved that he was an inhabitant of *T.*, and there was a custom for every one inhabiting *there* to cut and take rushes on the place in question; that he (by his servant) having cut down five or six loads of rushes, the defendants took and carried them away. The defendants called no witnesses. By the court—This is such evidence of property in the plaintiff, and conversion in the defendants, that they appear to be wrong-doers; for they have neither by evidence nor pleading shewn any right or title to these rushes, and appear to us to be mere strangers.]

Rackham v.  
Jesup,  
3 Will. 332.

Every thing, which tends to prove that the defendant has not been guilty of a conversion, may be given in evidence in an action of trover upon the general issue.

[*Vide* Bull.  
N. P. 48.]

A carrier, who is defendant in an action of trover, may give in evidence upon the general issue, that he refused to deliver the goods, because the money due for the carriage of them had not at the time of a demand been paid or tendered; for unless this money were paid or tendered before the demand was made, he has not been guilty of a conversion. And without mentioning any other instance of the like kind it may in the general be observed, that wherever the defendant in an action of trover had a right at the time of a demand to detain the chattel, he may give this right in evidence upon the general issue; because the defendant has not in any such case been guilty of a conversion.

Salk. 604.  
Hartford v.  
Jones.

If one joint-owner of a chattel bring an action of trover against another joint-owner, the defendant may give in evidence upon the general issue, that he is joint-owner with the plaintiff; because this, which shews a right in him to the possession of the chattel, does at the same time shew that he has not been guilty of a conversion: but, if one joint-owner of a chattel bring an action of trover against a stranger, the defendant cannot give in evidence upon the general issue, that *J. S.* is joint-owner with the plaintiff.

Salk. 295.  
Brown v.  
Hodges.  
[Comp. 442.  
S. C. cited.]

If the money, for which *J. S.* after converting the chattel of *J. N.* sold it, have been recovered by *J. N.* in an action of *assumpsit*, and *J. N.* afterwards bring an action of trover for the conversion of the same chattel, the judgment in the action of *assumpsit* may be given in evidence in the action of trover upon the general issue; because as it appears from this judgment, that the

Ld. Raym.  
1217.  
Lamine v.  
Dorrel.

plaintiff has recovered the value of the chattel, it does likewise appear, that he has no property therein; and, consequently, that the defendant has not been guilty of a conversion.

3 Burr.  
1364.

[In some cases it is allowed in this action to bringeth thing into court for which the action is brought. But herein this distinction is to be observed: if trover is brought for a specifick chattel of an ascertained quantity and quality, and unattended with any circumstances that may enhance the damages beyond the real value, but that its real and ascertained value must be the sole measure of the damages, then, the specifick thing demanded may be brought into court. But, where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any tort accompanying it, that may enhance the damage above the real value of the thing, and there is no rule whereby to estimate the additional value, there, it shall not be brought into court.]

Whitlend v.  
Fuller, 2 Bl.  
Rep. 902.

In trover for a bond, though the case seemed a very favourable one for the defendant, the court said they could stay the proceedings upon the delivery up of the bond, as the plaintiff insisted upon going for special damages.

Cook v.  
Holgate,  
C. B. Tr.  
10 G. 2.  
Watts v. Phipps, B. R. East. 7 G. 3. Bull. N. P. 49.

Where goods are cumbrous, the court will grant a rule to shew cause, why on the delivery of the goods to the plaintiff, and paying costs, proceedings should not be stayed.]

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## Tythes\*.

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THE word *Tythe* is derived from the *Saxon* word *Teoða*, which signifies the tenth part of a thing.

Of every thing, of which tythe is due of common right, tythe is always the tenth part of the thing.

But of every thing, of which tythe is only due by custom, more or less than the tenth part of the thing may be due for tythe.

[For where custom only subjects to tythe, custom must determine the proportion.]

Tythes, in their proper and original nature, are a spiritual and incorporeal inheritance: spiritual, from the uses to which they are consecrated; incorporeal, from the mode of their existence.

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[\* The Editor was induced to transpose this head, in expectation of being able to make some valuable additions to it.]

There is no doubt that tythes were originally a mere ecclesiastical (a) revenue; ecclesiastical persons only having capacity to take them (b); and ecclesiastical courts only having power to take cognizance of them. They were considered, not as any secular duty (c), or as issuing out of the land, but as collateral to the estate of the land, and were paid, not in respect of the land (d), but in respect of the persons of the laity, in return for the benefit they derived from the ministry and care of their spiritual pastors. They could not pass by copy of court-roll (e), because things spiritual could not lie in tenure, or be considered as parcel of a manor: unity of possession (f) could not extinguish them, because the spiritual nature could not be merged or extinguished, in other words, could not coalesce or incorporate with that which was material and temporal: nor could a release of all demands in lands (g) operate as a discharge of them; for as they would not pass under the denomination of land, neither would they be affected by a release of all claims arising out of lands.

Tythes, again, in their essence, have nothing substantial or permanent: they consist merely *in jure*, are merely a right. An estate in tythes is no more than a title to a share or portion of the produce after it shall have been separated from the general mass: before severance it is wholly uncertain what the amount of that share or portion may be; nay more, its very existence is precarious; this, like its quantity, depending upon the accidents of climate, season, soil, cultivation, and the will and caprice of the several owners or possessors. If the ground be not sown, if the farms be not stocked, if the fruits be not gathered, no tythe can possibly arise. For tythe is payable, as we have said before, not in respect of the land, but of the person: it is not an estate in the land, but a right to a determinate proportion of the fruits with all the industry and expence that have been bestowed in bringing them forward and collecting them. Tythe, then, in itself, is not an object of our external senses: it is neither visible, nor tangible: its produce, indeed, may be seen and felt, but it exists itself only in the mind's eye, and in contemplation of law. It follows, therefore, that it is incorporeal: for the law ascribes corporeity only to those objects which are substantial and permanent. From their incorporeity tythes are said to lie in grant, and not in livery; that is, they could not pass from one man to another by livery of seisin, the ancient mode of transfer, nor could actual possession be given of them; but the property in them could only be transferred by deed. In consequence of their incorporeity it was doubted, whether a rent could be reserved upon them; for being incapable of locality, there was no place where a distress could be taken of them. And to obviate this doubt a statute was passed in the reign of the present king, which empowers ecclesiastical persons to grant leases for lives or years of their incorporeal hereditaments. Of the king's right to reserve a rent on a demise of tythes, no doubt indeed was ever entertained; because by the prerogative the king had a right to distrain upon any lands in the possession of his lessee.

(a) Moor, 530.  
Hob. 296.  
(b) 2 Co. 43. b.  
5 Co. Cawdrie's case.  
(c) 1 Leon. 300.  
(d) Day, 5 b. 6. a.  
(e) Cro. Eliz. 293.  
814.  
(f) Dav. 6. a.  
(g) 1 Leon. 300.

2 Bl. Comm.

5 G. 3. c. 7.

32 H. 8.  
c. 7. § 8.  
3 Will. 30.

But the revolution which took place in our ecclesiastical polity in the time of *Henry* the Eighth has almost entirely changed the nature of this species of property; and there now seems to be scarcely any difference between an inheritance in lands and an inheritance in tythes. When the benefices which the regular clergy had appropriated to themselves fell, upon the dissolution of the monasteries, into the hands of the king, he was prompted by his profuseness, and induced by policy to make grants of them to lay-persons. But in order that the tythes might answer the purposes of civil life, and accommodate themselves to the exigencies of their new proprietors, it became necessary to secularize them, and to endue them with all the qualities of real property. For this purpose an act of parliament was passed; so that tythes in the hands of a lay-person may now be treated like any other kind of property: they may be put in view in an assize: they are demandable in a *precipe quod reddat*: they are subject to dower: fines may be levied, and recoveries may be suffered of them: ejectments may be brought for them: in short, they have all the properties and all the incidents of a lay-fee, except that they lie in grant, and not in livery; a distinction which now marks no great difference, since the statute of frauds allows no interest of any permanency to pass even in real property, unless the grant be attested by some written instrument.]

Under this Title it will be proper to shew,

- (A) Of what Things Tythe is in general due.
- (B) Who are liable to the Payment of a personal Tythe.
- (C) Of what Things a predial Tythe is due.

- 1. Of Agistment.
- 2. Of Corn.
- 3. Of Hay.
- 4. Of Wood.
- 5. Of divers other Things.

- (D) Of what Things a mixed Tythe is due.

- 1. Of the Young of a Beast.
- 2. Of the Eggs or Young of a Bird or Fowl.
- 3. Of Wool.
- 4. Of divers other Things.

- (E) To whom Tythe is in general to be paid.
- (F) To whom parochial Tythes are to be paid.
- (G) To whom extraparochial Tythes are to be paid.
- (H) Of the Right to a Portion of Tythes in a Parish.

(I) By

- (I) By whom Tythe is to be paid.
- (K) What Tythes are to be deemed small Tythes.
- (L) How far the Custom of a Parish is to be regarded in the setting out of Tythes.
- (M) Of the Time and Manner of paying personal Tythes, where there is no Custom in a Parish.
- (N) Of the Time and Manner of setting out predial Tythes, where there is no Custom in a Parish.
- (O) Of the Time and Manner of setting out or paying mixed Tythes, where there is no Custom in a Parish.
- (P) Of the Time and Manner of paying Tythes due by Custom.
- (Q) In what Cases the Payment of Tythes may be suspended.

- 1. Of the Produce of Lands in the King's Hands.
- 2. Of the Produce of Lands which have been barren.
- 3. Of the Produce of Glebe Lands.

(R) Of a *Modus decimandi*.

- 1. In general.
- 2. Of the Certainty required in a *Modus*.
- 3. Of a *Modus*, which amounts to a Prescription in *Non decimando*.
- 4. Of a *Modus*, which has not been constantly paid.
- 5. Of a leaping *Modus*.
- 6. Of a *Modus*, which is too rank.
- 7. Of a *Modus*, which is liable to fraud.
- 8. Of a *Modus* for such Persons as live out of the Parish.
- 9. Of the Extent of a *Modus*.

(S) Of a Prescription in *Non decimando*.

(T) Of a Discharge of Tythes by Grant.

(U) Of a Discharge of Tythes by Bull.

(W) Of a Discharge of the Payment of Tythes by Order.

(X) Of a Discharge of the Payment of Tythes by Unity of Possession.

- (Y) Of Agreements and Leases concerning Tythes.
- (Z) Of a Suit in a Spiritual Court for Subtraction of Tythe.
- (A a) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tythe.
- (B b) Of a Suit in a Court of Equity for Subtraction of Tythe.
- (C c) Of a Suit in a Court of Equity to establish a *Modus*, or a customary Manner of setting out Tythe.
- (D d) Of an Action upon the Statute against Subtraction of Tythe.
- (E e) Of recovering in a summary Way the Value of small Tythes subtracted.
- (F f) Of recovering Tythe due from *Quakers*.
- (G g) What Remedy the Occupier has, when the Person entitled to the Tythe set out does not fetch it away in a reasonable Time.

(A) Of what Things Tythes are in general due.

**T**YTHES of some things are due of common right, of others by custom.

Tythe is not due of common right of any fruit of the earth, which does not renew annually.

11 Rep. 13. Tythe, which arises from a fruit of the earth, can never be  
Cro. Eliz. part of the land from which it arises, but must always be collateral  
161. 216. thereto.  
Cro. Ja. 452.

11 Rep. 13. Nay, tythe is so collateral to the land from which it arises,  
Priidle that if a lease be made of the glebe belonging to a rectory, with  
Napier. all the profits and advantages thereof, and there be a covenant,  
Cro. Eliz. that the rent to be paid shall be in full satisfaction of every kind  
161. of exaction and demand belonging to the rectory; yet, if the  
glebe be not expressly discharged of tythe, the lessee shall be liable  
to the payment of tythe for the glebe.

Fitz. N. B. Tythe is not due of common right of the produce of a mine  
53. or quarry; because such produce does not renew annually, but is  
Bro. Difin. the substance of the earth, and has perhaps been so for many  
pl. 13. years.  
2 Inst. 651.  
1 Roll. Abr. 637. Cro. Eliz. 277.

2 Vern. 46. But tythe may be due by custom of the produce of a mine or  
Buxton v. quarry.  
Hutchinson.

Tythe



Tythe is not due of common right of lime; the chalk, of which it is made, being part of the soil. 1 Roll. Abr. 637. pl. 5.

Tythe is not due of common right of bricks; because these are made of earth. 2 M. d. 77. Stourfield's case.

Tythe is not due of common right of turf or gravel; because both these are part of the soil. 1 Mod. 35.

It has been holden, that tythe is not due of common right of falt; because this is not a fruit of the earth. 1 Roll. Abr. 642. S. pl. 8.

But every one of these things, and all things of the like kind, may by custom be liable to the payment of tythe. 1 Roll. Abr. 642. S. pl. 7. pl. 8.

Tythe is not due of common right of a house; because tythe is only due of common right of such things as renew annually. 11 Rep. 16. Graunt's case.

But houses in *London* are by a decree, which was confirmed by an act of parliament, made liable to the payment of tythe. 2 Inst. 659. 37 H. 8. c. 2.

And before this decree many houses in *London* were by custom liable to the payment of tythe; the quantum to be paid being thereby only settled, as to such houses for which there was no customary payment. 2 Inst. 659. H. d. 116. Gibb. Eq. Rep. 193. 194.

There is in most ancient cities and boroughs a custom to pay tythe of houses; without which there would not be in many parishes a proper maintenance for the clergy. 11 Rep. 16. Graunt's case.

It was holden by three barons of the Exchequer, *Price, Montague*, and *Page*, contrary to the opinion of *Bury*, Chief Baron, that two tythes may be due of the same thing, one of common right, the other by custom. Bunb. 102. Bunb. 43. Earl of Scarborough v. Hunter.

## (B) Who are liable to the Payment of a personal Tythe.

**SUCH** tythe, as arises from the profit of a man's personal labour, in the exercise of an art, trade, or employment, is called a personal tythe. 2 Inst. 649.

A personal tythe is only to be paid of the clear gain which arises from the personal labour of a man, after deducting all charge and expence, according to the estate, condition, or degree of the man. 2 Inst. 62. 658.

By the 2 & 3 Ed. 6. c. 13. § 7. common day-labourers are exempted from the payment of a personal tythe.

Servants in husbandry are not liable to the payment of a personal tythe; for by their labour the tythes of many things are increased. 1 Roll. Abr. 646. pl. 1.

A miller is liable to the payment of a personal tythe. 2 Inst. 621. 1 Roll. Abr. 641. pl. 19. Cro. Ja. 523.

And it seems to have been formerly holden, that the occupier of a corn-mill, besides being liable to the payment of a personal tythe, is also liable to pay, as a predial tythe, the tenth part of his toll. 2 Roll. Rep. 84. Show. 281. Brownl 32.

It

1 Eq. Caf. It is however now settled, by a decree of the House of Lords,  
 Abr. 366. upon an appeal from a decree of the court of Exchequer, that  
 Newt. v. only a personal tythe is due from the occupier of a corn-mill.  
 Chamber-  
 lain. 1 Br. P. C. 157. S. C. [2 P. Wms. 463. S. C. cited. *Vue Dodson v. Oliver*, Bunb. 73.]

Cro. J. 429. The occupier of a new-erected mill is liable to the payment of a personal tythe, although the mill be erected upon land discharged of tythes.

Mar. 15. It is said in one book, that the occupier of an ancient mill  
 pl. 36. is not liable to the payment of a personal tythe: but that the occupier of a new mill is by the 9 Ed. 2. *ft.* 1. c. 5. made liable thereto.

12 Mod. This seems to be a mistake; for that statute only provides,  
 243. Hart that new-erected mills shall be liable to the payment of tythe: but  
 v. Hale, as nothing is therein said concerning ancient mills, there can be  
 3 Bullstr. 212 no doubt, that such ancient mills, as before the making of that statute were liable to the payment of a personal tythe, continued afterwards to be liable thereto.

1 Roll. Abr. If the man who has let a ship to a fisherman receive, for the  
 656. N. use of his ship, a parcel of the fish which are caught; the fisher-  
 pl. 2. man is not liable to the payment of a personal tythe for these fish, because they are no part of his gain.

1 Roll. Abr. If a man purchase a house for three hundred pounds, and after  
 656. N. sell it for five hundred, no personal tythe is due; for the personal  
 pl. 3. labour bears no proportion in this case to the profit.

2 Bullstr. If an innkeeper have such profit out of his kitchen, cellar, and  
 141. stables, as to make two hundred pounds of what cost him only  
 Dolley v. one hundred, no personal tythe is due; because the profit did not  
 Davis, in this case arise from personal labour alone, and so far as it did, it arose perhaps more from the personal labour of servants than from that of the master of the inn.

### (C) Of what Things a predial Tythe is due.

8 Inst. 649. SUCH tythe, as arises immediately from a fruit of the earth, as from corn, hay, hemp, or hops, or from any kind of fruit, feed, or herb, is called a predial tythe.

2 Inst. 647. It is so called because it arises immediately from a fruit of the farm or earth.

4 Mod. 344. Divers things are by the ecclesiastical law liable to the payment of a predial tythe, which by the common law are not.

The design under this head is to shew, what things are liable by the common law to the payment of a predial tythe.

1 Roll. Abr. In doing this it will appear, that some things, which are in  
 637. E. pl. 2. general exempted therefrom, become by custom liable to the pay-  
 1 Roll. Abr. ment of a predial tythe.  
 642. S. pl. 7.  
 pl. 8.

1 Roll. Abr. It will also appear, that some things, which are in general  
 645. pl. 11. liable thereto, are under particular circumstances exempted from  
 Cro. Eliz. the payment of a predial tythe.  
 475  
 Ricem. 335. 12 Mod. 235.

But wherever any fraud is used, to bring a thing under a circumstance, by reason of which it would, if it had come fairly thereunder, have been exempted from the payment of a predial tythe, it is by such fraud rendered liable thereto. Cro. Eliz. 475. Freem. 335.

As it would be tedious to enumerate all the things which are liable to the payment of a predial tythe, only those shall be mentioned concerning the tythe of which some question has arisen: but from those which shall be mentioned, it may be easily collected, of what other things a predial tythe is due.

### 1. Of Agistment.

Agisting, in the strict sense of the word, means depasturing a beast the property of a stranger; but in its legal sense it means depasturing the beast of the occupier of the land as well as the beast of a stranger.

[Agistment tythe is paid, not for the increase or improvement of the animal agisted, but for the grafs eaten by it, and is proportioned to the value of the grafs, not to the value of the actual improvement. But being the tythe of the grafs eaten, it arises immediately from the soil, and is therefore a predial tythe. Scarr v. Trinity College, Anstr. 761. Ellis v. Saul, Id. 332. Holbeach v. Degge, 217.

Whadcock, Haidr. 184. Linw. 194.

Where therefore the occupier of land does not agist his own cattle, but those of strangers, the tythe for the agistment of barren cattle is due from the occupier, as being owner of the grafs for which the tythe is paid: but, if the cattle are profitable, the owner of them is accountable for the tythes. Underwood v. Gibbon, Bunb. 3. Fisher v. Lemen, 9 Vin. Abr. 38. pl. 7.

Agistment tythe being the tythe of the grafs, it follows, that if the grafs has before paid tythe of hay, no tythe is due for the agistment of the aftermath.] Ellis v. Saul, ubi supra.

An occupier of land is not liable to the payment of tythe for depasturing horses or other beasts used in husbandry in the parish in which they are depastured; because the tythe of other things is by the work of such beasts increased. 1 Roll. Abr. 646. pl. 2. pl. 3. pl. 6. pl. 7. Cro. Eliz. 446. Ld. Raym. 130.

But, if horses or other beasts are used in husbandry out of the parish in which they are depastured, an agistment tythe is due for such beasts. 7 Mod. 114. Harrow's case. Ld. Raym. 130. [Bosworth v. Limbrick, 2 Rayn. 809.]

It seems to be the better opinion, that tythe is not due for depasturing a saddle-horse which an occupier of land keeps for himself or servant to ride upon. 1 Roll. Abr. 641. pl. 4. Cro. Ja. 430. Bulstr. 171. Bunb. 3.

But an occupier of land is liable to an agistment tythe for depasturing a horse, which he keeps for sale. Cro. Ja. 430. Hampton v.

Wild: 1 Roll. Abr. 647. pl. 14. [Coach horses are liable to the payment of an agistment tythe: Thorpe v. Bendlowes, 3 Burn's E. L. 446.]

[Horses kept on one farm for its cultivation, and used occasionally on another farm in a different parish, shall not pay agistment tythe. *Secus*, if habitually so used.] Filewood v. Burton, Anstr. 493.

Tythe is not due for depasturing milch cattle, which are milked in the parish in which they are depastured; because tythe is paid of their milk. 1 Roll. Abr. 646. pl. 2. Cro. Eliz. 446.

Hedl. 100.

If cows are reserved for calving, tythe is not due for depasturing them whilst they are dry: but, if they are afterwards sold, or milked in another parish, an agistment tythe is due for the time they were dry.

Cro. Eliz.

476

Sherington

v. Flewood.

Tythe is not due from an occupier of land for depasturing young cattle, which are reared to be used in husbandry, or to be milked.

Hedl. 86.

Woolmer-

ston's case.

But, if such young beasts are sold, before they come to such perfection as to be fit for husbandry, or before they give milk, tythe is to be paid for depasturing them.

Jenk. 231.

pl. 6.

Cro. Car.

An occupier of land is liable to tythe for depasturing cattle which he keeps for sale.

237. Show. P. C. 192.

Jenk. 281.

pl. 6.

Cro. Eliz.

446. 476.

Cro. Car.

If cattle, which have neither been used in husbandry nor been milked, are, after having been kept some time, killed to be spent in the family of the occupier of the land on which they were depastured, tythe is not due for depasturing them.

237.

Cro. Eliz.

476.

Bunb. 1.

Freem. 329.

Hardr. 35.

Guibert v.

Everley.

Poph. 142.

Poph. 142.

2 Roll. Rep

191.

[Vide 3 Burn's E. L. 448. and Bateman v. Aistrup, 2 Rayn. 692.]

It is in general true, that tythe is due for depasturing cattle which are the property of a stranger.

If an innkeeper put the horse of his guest into a pasture in his own occupation, he is liable to tythe for depasturing the horse.

Tythe is not due for depasturing any beast upon land which has in the same year paid tythe of hay.

1 Roll. Abr.

646. pl. 19.

[Vide Bate-

man v. Ai-

strup, 2 Rayn. contr.]

Tythe is not due for depasturing any beast upon the headland of a ploughed field; provided the headland be not wider than is sufficient to turn a plough and horses upon.

Bro. Disin.

pl. 18.

Tythe is not due for depasturing cattle upon land which has in the same year paid tythe of corn.

1 Roll. Abr.

642. pl. 9.

If land, which has paid tythe of corn in one year, be left unfown the next year, tythe is not due for depasturing a beast upon the land; because, by its lying fresh, the tythe of the next crop of corn is increased.

Sheph. Abr.

part 4. D.

104.

But if land, which has paid tythe of corn, be suffered to lie fresh longer than by the course of husbandry is usual, tythe is due for depasturing a beast upon the land.

As the questions, Whether tythe is due for depasturing sheep, and in what cases it is due, do not seem to be settled, it will not be amiss to mention the principal cases in which these questions have been agitated.

1 Roll. Rep.

63. pl. 7.

Mafcal v.

Price, Mich. 12 Ja. 1.

It is laid down in one case, that tythe is not due for depasturing sheep; because they are *animalia fructuosa*.

1 Roll. Abr.

642. R. pl.

8.

But in another book, of the same author's, where this case is mentioned, there is a *dubitatur*.

In a case not long after it was holden, that tythe should be paid for sheep, which after having been depastured in one parish from *Michaelmas-day* to *Lady-day* were removed into another; for otherwise the parson of the first parish may be defrauded of his tythe; for the sheep, which have been carried into a second parish, may not be brought back and sheared in the first.

Poph. 197.  
Anon Mich.  
2 Car. 1.

It was however said in this case by *Whitelock*, Justice, that *de animalibus inutilibus*, as horses, oxen, &c. the parson shall have agistment tythe: but that *de animalibus utilibus*, as cows, sheep, &c. he shall have tythe in kind.

In one case it is said to have been holden, that tythe is not to be paid for depasturing sheep which are afterwards eaten in the house of the occupier of the land.

Cro. Car.  
237. Facey  
v. Long,  
Mich. 7 Car. 1.

It would follow, as a necessary implication from the doctrine of this case, that tythe is due for depasturing sheep which are not afterwards eaten in the house of the occupier of the land.

But in another report of the same case it is said to have been holden, that tythe is not due for depasturing wethers; because they will yield a tythe of wool.

1 Roll. Abr.  
647. pl. 13.

In one modern case in the court of Exchequer it is said, that it seemed to be admitted, that tythe is due for depasturing yearling sheep.

Bunb. 90.  
Baker v.  
Sweet,  
Mich. 8 G. 1.

In another case shortly after in the same court it appeared, that sheep, after paying tythe of wool, had been fed upon turnips not severed, by which they were bettered to the value of five shillings each; and that they were then sold. It also appeared, that the defendant had, before the next shearing-time, bought in as many as were sold; and that of these tythe of wool was paid. It was insisted, that if an agistment tythe were to be paid for the sheep fold, and tythe of wool for those bought, this would be a double tything: but the court decreed the defendant to account for an agistment tythe for the sheep fold.

Gilb. Rep.  
in Eq. 231.  
Coleman v.  
Baker,  
Paich.  
12 G. 1.

In the latter case, the case of *Dummer* and *Wingfield*, Hil. 1 W. & M. was mentioned, in which it had been decreed, and the decree had been affirmed upon a rehearing, that tythe, for depasturing sheep, from the time they were sheared until they were sold, should be accounted for.

In a still later case, the court of Exchequer were of a quite different opinion. A bill being brought for the tythe of depasturing sheep four months in a parish after they had been shorn, and tythe of their wool had been paid in that parish, it appeared, that at the end of the four months they were removed into another parish, and that they were shorn there at the next shearing-time. In this case, the cases of *Coleman* and *Baker*, and of *Dummer* and *Wingfield*, were cited by the plaintiff's counsel: but the court decreed, that tythe should not be paid for depasturing sheep; because they are *animalia fructuosa*.

Bunb. 313.  
Poor v. Sey-  
mour, Hil.  
5 Geo. 2.

[The doctrine advanced in this case has, however, been over-ruled in later cases, upon this principle, that the tythe of wool being

Bateman v.  
Aistrup,  
2 Rayn. 658.

Howes v. Carter, Anstr. 560. being payable only in the parish where the sheep are shorn, they are not *animalia fructuosa* in the parish wherein they have been only agisted, and therefore shall pay an agistment tythe.]

## 2. Of Corn.

1 Roll. Abr. 645. pl. 11. It is laid down in divers cases, that tythe is not due of the rakings of corn involuntarily scattered.  
Cro. Eliz. 475. Moor, 278. Freem. 335.

Cro. Eliz. 475. Freem. 335. But, if more corn be fraudulently scattered, than if proper care had been taken would have been scattered, tythe is due of the rakings.

12 Mod. 235. It is said by *Holt*, Chief Justice, that tythe is due of the rakings of all corn, except such as is bound up in sheaves.

Teunant v. Stubbing, Anstr. 640. [If stubble be used partly for fodder, and partly for manure, so that the whole of it is consumed in husbandry, it is not subject to the payment of tythe: though it would be otherwise perhaps if an unusual quantity of it were left, in order to make a fraudulent profit of it.]

## 3. Of Hay.

Cro. Jo. 47. Webb v. Warner. Hay is liable to the payment of tythe, notwithstanding beasts of the plough or pail, or sheep, are to be fed therewith.  
1 Roll. Abr. 650. pl. 12. 12 Mod. 497.

1 Roll. Abr. 646. pl. 19. But tythe is not due of hay grown upon the headland of a ploughed field; provided the headland be not wider than is sufficient to turn a plough and horses upon.

1 Roll. Abr. 645. Crawley v. Wells, Mich. It is laid down in one case, that if a man cut grafs, and while it is in the swathe carry it, and feed his plough-cattle therewith, not having sufficient sustenance for them otherwise, tythe is not due thereof.

9 Car. 1. Bunb. 279. And in a much later case, the court of Exchequer seemed to be of opinion, that tythe is not due of vetches or clover, cut green  
Hayes v. Dowse, Hil. 3 Geo. 2. and given to cattle used in husbandry.

[And the law is so clear, that grafs newly cut and eaten by agricultural cattle is not tytheable, that in a late case, the bill, as to this point, was dismissed with costs. *Collyer v. Howse*, Anstr. 481.]

12 Mod. 498. Selby v. Bank, Pasch. But in a case some years prior to the latter case it was holden, that a right to tythe of hay accrues upon the mowing of the grafs, and that the subsequent application thereof, either while it is in grafs, or after it is made into hay, shall not, although beasts of the plough or pail are fed therewith, take away the right.  
13 W. 3.

Cro. Car. 393. Mead v. Thurman, Hil. 10 Car. 1. And the doctrine of the last case coincides with that of an old case; in which it is laid down, that tares cut green, and given to beasts of the plough, may by special custom be exempted from the payment of tythes: from whence it follows, that such tares are not in the general exempted therefrom.

It is laid down in divers books, that tythe is not due of after-mowth hay, because tythe can only be due once in the same year from the same land. 2 Inst. 652.  
Cro. Ja. 22.  
Ld. Raym.  
243.

But it is in other books laid down, that tythe is due of after-mowth hay. Cro. Eliz.  
660  
Cro. Ja.  
to this point.

116. Cro. Car. 403. 12 Mod. 498. Bunb. 10. Bunbury makes a *quare* as

And it has been holden in two modern cases, that if divers crops are grown upon the same land in the same year, tythe is to be paid of every crop. Bunb. 10.  
Benson v.  
Watkins,  
Hil. 3 G. 2.

Hil. 3 G. 1. Bunb. 314. Swinfen v. Digby, Hil. 3 G. 2.

#### 4. Of Wood.

It is said in one case, that before the constitution of *Stratford*, wood was only tythable in particular places by custom; because wood does not renew annually. 12 Mod. 117.

By that constitution, which was made in the seventeenth year of the reign of *Edward* the Third it was ordained, that tythes should be paid within the province of *Canterbury* of *silva cadua*. 2 Inst. 642.

In the next year, the commons complained to the king of that constitution, as an unprecedented thing; and petitioned, that the people might remain in the same state as they had been under his royal progenitors; and that a prohibition might be granted, for all who should be emploied in court Christian for tythe of wood. Ibid.

The answer was, The king willeth that law and reason be done. Ibid.

In another petition, presented in the twenty-first year of the same reign, the commons complained to the king, that the clergy, by virtue of the constitution made in the seventeenth year of his reign, demanded tythes both of grofs wood and underwood, whether the latter were sold or not. 2 Inst. 642.

To this the king answered, That the archbishop of *Canterbury* and the other bishops have answered, that tythe is only demanded, by virtue of that constitution, of underwood. Ibid.

After other petitions had been in vain presented by the commons, the great men of the realm did, in the forty-fifth year of the same reign, join with the commons in a petition.

In consequence of this petition, a statute was in the same year made in the following words, "At the complaint of the great men and commons, shewing by their petition, that when they sell their grofs wood, of the age of twenty or forty years, or of a greater age, to merchants, to their own profit, and to the aid of the king in his wars, the parsons and vicars of holy church do emplead, and trouble the said merchants in court Christian, for the tythes of the said wood, under the denomination of *silva cadua*, by reason of which they cannot sell their wood for the real value, to the great damage of themselves and the realm, it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath hitherto been." 45 Ed. 3.  
c. 3.

From

2 Inst. 642. From these petitions and answers and this statute it appears  
45 Edw. 3 plainly, that the demand of tythe of wood, by virtue of the con-  
c. 3. stitution made in the seventeenth year of the reign of *Edward* the  
Plowd. 470. Third, was at least as to grofs wood an encroachment.  
Bro. Prohib.  
pl. 1 Cro.  
Ja. 100.

2 Inst. 643. After the making of this statute, prohibitions were constantly  
644, 645. granted to suits instituted in spiritual courts for tythe of grofs  
wood: but two questions frequently arose; namely, What is  
grofs wood? and of what age grofs wood must be, before it is ex-  
empted from the payment of tythe?

2 Inst. 612. For the putting of an end to these questions it has been long  
643. settled, that by grofs wood is not meant high or large wood, but  
Cro Eliz. 1. such wood as is generally, or by the custom of a particular part  
12 Mod. of the country, used as timber; and that all such wood, if it be  
524. of the age of twenty years, is exempted from the payment of  
tythe.

2 Inst. 612. The wood of oaken, aspen, and elmen trees, being universally  
used as timber, it has been constantly holden, that such trees, if of  
the age of twenty years, are grofs wood.

2 Inst. 643. It was holden upon great deliberation, notwithstanding what is  
laid down to the contrary in *Plowd.* 470. that hornbeam trees, if  
of the age of twenty years, are grofs wood; because the wood of  
such trees is frequently used in building and repairing.

2 Inst. 643. It has for the same reason been holden, that an aspen tree, if of  
the age of twenty years, is grofs wood.

Plowd. 470. Tythe is in general due of beechen, birchen, hazel, willow,  
Cro Eliz. 1. fallow, alder, maple, and white-thorn trees, and of all fruit trees,  
Cro. Ja. 199. of what age soever they are; because the wood of these trees is  
1 Roll. Abr. not often used as timber.  
640. pl. 5.

pl. 6. Brownl. 94.

Hob. 219. But, if the wood of any of these trees be frequently used, in a  
Btownl. 94. particular part of the country where timber is scarce, in building  
or repairing, tythe is not due of such trees, if they are of the age  
of twenty years.

11 Rep. 48. It is laid down in divers cases, that if a timber tree, after it is  
Cro. Eliz. of the age of twenty years decay so as to be of no use for repair-  
477. Cro. ing or building, tythe is not due of the wood of this tree; be-  
Ja. 100. cause it was once privileged.  
1 Roll. Abr.  
640. pl. 2.

But the contrary is laid down in some other cases.

Std. 300. In two of these it is laid down, that, if the wood of a coppice  
1 Lev. 189. has been usually felled for firing, such wood shall pay tythe, al-  
though it stand till it be forty years of age.

Purb. 99. In another it is laid down, that if the wood of a timber tree be  
Greeraway v. The Earl of Kent, Hil. sold for firing, it is, although the tree be of the age of twenty  
7 G. 1. years, liable to the payment of tythe.

The doctrine however of the former cited cases has been con-  
firmed in a modern case.

MS. Rep. A bill being brought for tythe of the loppings of timber trees,  
Watson v. which had been sold for firing, it was insisted that this wood, which  
Tytton, would



would otherways have been exempted from the payment of tythes, was liable thereto, because it was sold for firing; and some of the cases above cited were relied upon.

Mich.  
25 G. 2.  
[Ambl.  
130.]

The bill was dismissed; and by Lord *Hardwicke*, Chancellour,

In the cases in 1 *Lev.* 189. and *Sid.* 300. the wood in question was coppice wood, which had been usually felled for firing; and consequently these cases do not conclude to the point: because such wood of what age soever it be is tythable. What is laid down in the case of *Greenaway* and *The Earl of Kent* is not now law; for in the case of *Bibye* and *Huxley*, *Hil.* 11 *Geo.* 1. which was subsequent thereto, it was agreed, that tythe is not due of the wood of a timber tree, which has been once privileged from the payment of tythe, although such wood be sold for firing.

It is in one book laid down, that the loppings of a timber tree, which are of twenty years growth, are exempted from the payment of tythe; because loppings of that age may be useful in building.

Plowd. 470.  
Soby v.  
Molins.

But it is laid down in divers other books, that if a timber tree of the age of twenty years be lopped, tythe is not to be paid of the loppings, although they are not of twenty years growth; for that as the tree is exempted from the payment of tythe, the loppings are likewise exempted.

Bro. Disin  
pl. 14.  
11 Rep. 48.  
Cro. El. 478.  
Godb. 175.  
1 Roll. Abr.  
640. pl. 3.

And the doctrine of the latter cited books was confirmed in the case of *Walton* and *Tryon*.

In this case it appeared, that the loppings of the trees, for the tythe of which the bill was brought, were not of twenty years growth: but it appeared, that the trees were of the age of twenty years, before they had ever been lopped. It was decreed by Lord *Hardwicke*, that tythe was not due of the loppings; for that if a tree be once privileged from paying tythe the privilege extends to all future loppings, of whatsoever age they are.

[3 Burn's  
E. L. 452.]

It has been holden, that although a tree was lopped, before it was of the age of twenty years, the future loppings of the tree, if they are of twenty years growth, are not liable to the payment of tythe.

1 Roll. Abr.  
640. pl. 1.

But in the case of *Walton* and *Tryon*, it was laid down by Lord *Hardwicke*, that if a tree was lopped, before it was of the age of twenty years, all future loppings, of how many years growth soever they may be, are liable to the payment of tythe.

It has been holden, that if a tree, which was privileged from paying tythe, be felled, the germins that spring from the root of the tree, are likewise privileged.

11 Rep. 48;  
Liford's  
case.

But in the case of *Walton* and *Tryon*, it was holden, that all germins, which spring from the roots of trees that have been felled, are liable to the payment of tythe.

The wood of a coppice, which has usually been felled for firing, is liable to pay tythe, although the same be of the age of forty years.

1 *Lev.* 189;  
*Sid.* 300.

And in the case of *Walton* and *Tryon*, it was laid down by Lord *Hardwicke*, that if, when the wood of a coppice is felled, some trees growing therein, which are of the age of twenty

years, and have never been lopped, are lopped, and the loppings are promiscuously bound up in faggots with the coppice wood, tythe must be paid of the whole : for that it would be very difficult to separate the tythable wood from that which is not so, and the owner ought to suffer for his folly, in mixing the latter with the former.

11 Rep. 48.  
Liford's  
case.  
Freem. 334.

If a tree, or the lopping of a tree, is exempted from the payment of tythe, the bark of the tree or lopping is likewise exempted.

The words *silva cadua* are sometimes used, as if they signified the same as the word *underwood* : but the former words are of a much larger signification ; for under the words *silva cadua* is included every sort of wood, except gross wood of the age of twenty years.

It appears, from what has been already mentioned, that tythe is in general due of *silva cadua*.

1 Roll. Abr.  
637. pl. 6.  
Cro. Car.  
526.

If young trees are taken out of a nursery in one parish, and sold to be planted in another parish, tythe is due thereof ; else the parson might be deprived of the tythes of his whole parish, by converting the land into nurseries.

Hardr. 380.  
Grant v.  
Hadding.

And it is in one case laid down, that tythe is due of young trees taken out of a nursery, although they are sold to be planted in the same parish.

But, although it be in the general true, that *silva cadua* is liable to the payment of tythes, yet such wood is under certain circumstances exempted therefrom.

1 Roll. Abr.  
645. pl. 8.  
pl. 9.

If *silva cadua* be used in the parish wherein it grew to burn bricks for the repairing or necessary enlarging of the house of a parishioner, tythe is not due thereof.

1 Roll. Abr.  
645. pl. 10.

But, if such wood be used to burn bricks for enlarging a house more than is necessary for the family of the parishioner, tythe is due thereof.

Cro. Eliz.  
609.  
Austin v.  
Lucas,

It is laid down in two cases, that *silva cadua* is exempted from the payment of tythe, when it is burnt in the house of an inhabitant of the parish wherein it grew.

Pasch. 40 Eliz. Ellis v. Drake, Pasch. 14 Ja. 1.

Sid. 447.  
Tilden v.  
Waller,  
Pasch.

But in a case, not many years subsequent to these, it is laid down, that such wood is only exempted from the payment of tythe, when it is burnt in the house of a parishioner, who occupies land in the parish wherein it grew.

22 Car. 1.  
1 Ventr. 75.  
Freem. 335.  
Anon. Mich.  
1. W. 3.

And from a still later case it may be inferred, that such wood is only exempted from the payment of tythe when it is burnt in the house of an occupier of land in the parish in which it grew for the necessary use of his family ; for it is therein laid down, that if the wood be used for drying hops, of which the parson has no benefit, his tythe of hops having been set out before the hops were dried, tythe must be paid thereof.

1 Roll. Abr.  
624. pi. 2.  
Ld. Raym.  
230.

If an occupier of land, in a parish where tythe of wood and tythe of corn are both due to the same person, use *silva cadua*, for inclosing his own corn-land, which lies in the parish wherein the wood

wood grew, tythe is not due of the wood ; because this is used for the preservation of corn whereof tythe is due.

But, if such wood be used for inclosing the corn-land of another person, tythe is due thereof ; notwithstanding the person, who is entitled to the tythe of the wood, is likewise entitled to the tythe of the corn grown upon the land inclosed.

1 Sound 143.  
Croucher v.  
Collins.

If the tythe of hops and the tythe of wood are both due to the same person, tythe is not due of *silva cedua* used in poling the hops : because the tythe of the hops is increased by the use of the poles.

Freem. 334.  
Anon.  
Bunb. 20.

Tythe is not due of *silva cedua*, used in making or repairing carts or ploughs to be used in husbandry in the parish wherein the wood grew : because by the use of the carts and ploughs the tythes of other things are increased.

G. 11f. 93.  
Anon.

### 5. Of divers other Things.

It is laid down in one book, that tythe is to be paid of acorns, although the trees upon which they grew would not be liable to the payment of tythe : because the acorns are an annual increase.

11 Rep. 49.  
Liford's  
case.

But in two other books it is laid down, that tythe is not due of acorns, unless they are gathered and sold.

Litt. Rep.  
40.  
Hecl. 27.  
Litt. Rep.  
148.  
Sile's case.

All kinds of flowers and roots, whether they grew in a garden or a field, are liable to the payment of tythes.

Fruit of every kind, although it grow upon a tree in the hedge of a field, is liable to the payment of tythe.

2 Inst. 621.  
Bunb. 184.

Furze is not liable to the payment of tythe, if it be burnt in the house of a parishioner, who occupies land in the parish wherein it grew.

Litt. Rep.  
368.  
Rooker v.  
Comersel.  
Ibid.

But, if furze be sold, it is liable to the payment of tythe.

If a man gather green peas to eat in his house tythe is not due thereof.

1 Roll. Abr.  
647. pl. 12.

But, if a man gather green peas, to sell or to feed hogs with, they are liable to the payment of tythe.

1 Roll. Abr.  
647. pl. 12.

In one modern case, it seems to have been the opinion of the court, that turnips are only liable to pay tythe, when they are drawn.

Bunb. 10.  
Benfon v.  
W. k. n.,  
Hil. 7 G. 3.

But in a more modern case it was holden, that although turnips are not drawn, but are fed off the ground, tythe is due thereof, in case they are eaten by unprofitable cattle.

Bunb. 14.  
Swinfen v.  
Digby, Hil.  
5 G. 2.

So, it hath been holden, that tythes are due for turnips sowed after corn, and eaten by unprofitable cattle.]

Crow v.  
Stoddart,  
3 Burn's E. L. 465.

### (D) Of what Things a mixed Tythe is due.

**S**UCH tythe, as arises from a beast, bird, or fowl, is called a mixed tythe.

2 Inst. 619.  
1 Roll. Abr.  
625.

2 Inst. 621. Divers things are by the ecclesiastical law liable to the pay-  
 4 Mod. 344. ment of a mixed tythe, which by the common law are not.

The design under this head is to shew, of what things a mixed tythe is due at the common law.

1 Roll. Abr. In doing this it will appear, that some things, which are in  
 635. C. pl. 3. general exempted therefrom, become by custom liable to the pay-  
 636. pl. 7. ment of a mixed tythe.  
 Cro. Car.  
 339. 1 Vent. 5.

1 Roll. Abr. It will also appear, that some things, which are in general  
 645. pl. 14. liable thereto, are under particular circumstances exempted from  
 pl. 16. the payment of a mixed tythe.

1 Roll. Abr. But wherever any fraud is used to bring a thing under a cir-  
 645. pl. 15. cumstance, by reason of which it would, if it had come fairly  
 646. pl. 17. thereunder, have been exempted from the payment of a mixed  
 tythe, it is by such fraud rendered liable thereto.

As it would be tedious to enumerate all the things which are liable to the payment of a mixed tythe, only those shall be mentioned concerning the tythe of which some question has arisen: but from those which shall be mentioned, it may be easily collected of what other things a mixed tythe is due.

### 1. Of the Young of a Beast.

It is in general true, that tythe is due of the young of a beast, which is not *feræ naturæ*.

Bro. Disin. But tythe is not due of the young of a hound, an ape, or of any  
 pl. 20. beast which is kept only for pleasure.

2 Inst. 651. Tythe is not due of the young of a deer; for a deer is *feræ naturæ*.

1 Roll. Abr. And for the same reason, tythe is not due of the young of a  
 635. C. coney.  
 pl. 3. Cro.

Car. 339. 1 Vent. 5.

### 2. Of the Eggs and Young of a Bird or Fowl.

1 Roll. Abr. It is in general true, that tythe is due of the young of a  
 642. pl. 6. bird or fowl which is not *feræ naturæ*, unless the eggs of the bird  
 2 P. Wms. or fowl have before paid tythe.  
 463.

Bro. Disin. But tythe is not due of the eggs or young of a bird, or fowl,  
 pl. 20. which is kept only for pleasure.

Moor, 599. Tythe is not due of the eggs or young of a partridge or pheasant;  
 2 P. Wms. because these are *feræ naturæ*.  
 463.

1 Roll. Abr. If a man keep pheasants, whose wings are clipped, in an in-  
 636. pl. 5. closed wood, and from their eggs hatch and bring up young pheasants, tythe is not due of the young pheasants, although none were paid of the eggs: because the old pheasants are not reclaimed, and would go out of the inclosure, if their wings were not clipped.

Moor, 599. It was heretofore holden, that neither the eggs nor young of a  
 Hutton v. turkey are liable to the payment of tythe; because turkies are  
 Price. *feræ naturæ*.

But

But it was holden in a modern case, that, as turkies are at this day as tame as hens or any other poultry, tythe is due of the eggs or young of a turkey. 2 P. Wms. 463. Carleton v. Brightwell.

Tythe is not due of young pigeons, in case they are spent in the house of the occupier of land who breeds them. 1 Roll. Abr. 644. Z. pl. 4. pl. 6.

1 Ventr. 5. 2 Mod. 77. 12 Mod. 47.

But, if young pigeons are fold, tythe is due thereof. 1 Roll. Abr. 644. Z. pl. 5. pl. 6.

### 3. Of Wool.

If a man pay the tenth lamb as tythe at *Mark-tide*, and at *Midsummer* shear the other nine lambs, tythe is due of the wool; for although there were only two months, between the time of paying the tythe lambs, which were not shorn, and the shearing of the residue, there is a new increase. 1 Roll. Abr. 642. R. pl. 7. Bunb. 90.

If a man shear his sheep about their necks at *Michaelmas*, to preserve their fleeces from the brambles, tythe is not due of the wool: for it appears, that this, it being done before their wool is much grown, could not be done for the sake of the wool. 1 Roll. Abr. 645. pl. 16.

If a man, after their wool is much grown, shear his sheep about their necks, in order to preserve them from vermin, tythe is not due of the wool. 1 Roll. Abr. 645. pl. 16.

If a man, a little before shearing-time, cut dirty locks of wool from his sheep, in order to preserve them from vermin, tythe is not due of the wool. 1 Roll. Abr. 646. pl. 17.

But if in either case more wool, than ought to have been cut off, be fraudulently cut off, tythe is due of the wool. 1 Roll. Abr. 645. pl. 15. 646. pl. 17.

It is laid down in one case, that tythe is not due of the wool of a sheep, killed to be spent in the house, or of the wool of a sheep which dies of itself. Litt. Rep. 31. Civil v. Scot, Pasch. 3 Car. 1.

But in another case, a few years after, it is laid down, that tythe is due of the wool of a sheep, killed to be spent in the house. 1 Roll. Abr. 646. pl. 18. Dent v. Salvin, Pasch. 14 Car. 1.

[Tythe of the wool of lambs is due, though the parson may have received the tythe of the lambs in their wool.] Carthew v. Edwards, 3 Burn's E. L. 474.

### 4. Of divers other Things.

Fish taken out of a pond, or an inclosed river, are liable to the payment of tythe. [This is by no means clear.

But no tythe is due of fish taken out of the sea, or an open river, although they are taken by a person having a several fishery; because fish are *fera nature*. Noy, 102. 1 Roll. Abr. 636. pl. 4. pl. 6. pl. 7. Cro. Car. 339. 1 Lev. 179. Sid. 278.

Honey and bees-wax are liable to the payment of tythe. Fitz. N. B. 51. 1 Roll. Abr. 635. C. pl. 1. Cro. Car. 559.

But wherever tythe of the honey and wax of bees has been paid, no tythe is due of the bees. Cro. Car. 404. Anon.

Tythe is not due of the milk, spent in the house of a farmer; in case the house stand in the parish, wherein the cows are milked. Ld. Raym. 129. Scote v. Lowther.

## (E) To whom Tythe is in the general to be paid.

2 Rep. 45. IT is laid down in divers books, that only spiritual persons were  
 11 Rep. 13. at the common law capable of receiving tythes; because tythes  
 Cro. Eliz. are an ecclesiastical inheritance.  
 293. 519.  
 763. Hob. 296.

2 Rep. 44. As a layman had not, before the 32 H. 8. c. 7. any remedy in  
 2 Inst. 643. the case of subtraction of tythe, it follows that a layman was not  
 Cro. Eliz. at the common law capable of acquiring a right to tythe; for  
 512. wherever there is a right, there must be a remedy for the recovery thereof.

Cro. Eliz. The king was indeed at the common law capable of receiving  
 293. 592. tythes, because he is *persona mixta*; but he could only receive them  
 763. in his spiritual capacity, and not as belonging to a manor.

2 Rep. 44. It is laid down, that the king's grantee, although a layman, was  
 2 Rep. 44. at the common law capable, by virtue of the king's prerogative,  
 Bishop of of receiving tythe.  
 Winchester's case.

1 Roll. Abr. But it seems to be the better opinion, that as the king himself  
 655. J. p. 2. is only capable of receiving tythe in his spiritual capacity, and not  
 Har. 315. by virtue of his prerogative, the capacity of receiving tythe, being personal, cannot be conveyed to a layman.

Cro. Eliz. A layman could at the common law have prescribed, that in  
 599. 763. consideration of an annual sum of money to be paid to the parson,  
 Bro. Dism. for all tythes arising within a manor, he was entitled to the  
 pl. 1. pl. 5. tenths of all corn growing in the manor.  
 2 Rep. 44.

1 Inst. 159. At this day a layman is capable of receiving tythes; for the  
 11 Rep. 13. tythes belonging to many churches, and some portions of tythes,  
 Fin. Rep. which upon dissolution of monasteries were by divers statutes vested  
 309. in the crown, are become lay-fees, and have all the properties of temporal inheritances.

## (F) To whom parochial Tythes are to be paid.

2 Inst. 641. BEFORE the decretal epistle of Pope *Innocent* the Third, which  
 653. was written about the year 1200, and which, from its being  
 Bro. Dism. dated at *Lateran*, has been often mistaken for a decree of the  
 pl. 21. council of *Lateran* holden not many years before, parochial tythes  
 Hob. 296. were not appropriated to any spiritual person in particular: but it was in the power of every person, to pay tythes to such spiritual person or corporation as he pleased.

2 Inst. 641. By that epistle, which laments the inconveniencies arising from this power, it was directed, that, for the time to come, the tythes of all parishes should be paid to the persons having the cure of souls in the respective parishes, who were called rectors.

*Ibid.* That epistle, which would not have been in itself obligatory, being founded in reason and justice was well received, and soon became part of the law of the land; and in consequence thereof  
 rectors

rectors became entitled to all the tythes, except portions of tythes, arising in their respective parishes.

As many advowsons had, before that decretal epistle was written, been granted to divers religious persons, as to abbots, priors, single deans and single prebendaries, and their successors, the practice of collating themselves to the churches thereto belonging, and of undertaking personally the cure of souls, was for the sake of keeping the tythes in their own hands soon after introduced. As this practice was followed by their successors, the tythes of many parishes were kept perpetually in their own hands. In process of time, in order to avoid a multiplicity of institutions and inductions, such persons obtained licences, that they and their successors might be perpetual incumbents of the churches.

Spelm. Eng. Works, 137.

In this way appropriation to churches began: but churches were at that time only appropriated to such single spiritual persons, as did in person administer the sacraments and perform other divine service.

Spelm. Eng. Works, 138.

Deans and chapters afterwards obtained licences, for the appropriation of churches belonging to their advowsons: but as they, being a body corporate, could not jointly do the duty of a parish priest, and as no one in particular was bound to do it, a deputy, called a vicar, was appointed under their common seal to do that duty: but the person so appointed was usually a member of the spiritual corporation to which the church was appropriated.

*Ibid.*

The practice of appointing vicars being once introduced, prioresses and nuns obtained the like licences for the appropriation of the churches belonging to their advowsons; and they likewise appointed vicars, and took the profits of the advowsons to themselves.

*Ibid.*

Encouraged by these examples the abbots, priors, single deans and single prebends, who had before performed divine service in person, likewise appointed vicars.

*Ibid.*

It seems probable, that vicars were not at first endowed with any part of the tythes belonging to their respective churches, but received a certain yearly sum of money, by way of a salary; and it appears, that the sum received by some vicars was very small.

For by the 15 R. 2. c. 6. after reciting, that divers damages and hindrances have happened, and daily do happen, to the parishioners of divers places by the appropriation of the benefices of such places, it is agreed and assented, "That in every licence, from henceforth to be made in the Chancery, of the appropriation of any parish church, it shall be expressly contained and comprised, that the diocesan of the place upon the appropriation of such churches shall ordain, according to the value of such churches, a convenient sum of money, to be paid and distributed yearly, of the fruits and profits of the same churches, by those that shall have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed."

Afterwards by the 4 H. 4. c. 12. it is ordained, "That from henceforth in every church appropriated, or to be appropriated,

“ a secular person be ordained perpetual vicar, canonically instituted and inducted to the same, and convenably endowed by the discretion of the ordinary, to do divine service, to inform the people, and to keep hospitality there ; and that no religious person be in anywise made vicar in any church appropriated, or to be appropriated, for the time to come.”

As it is only provided by the 4 H. 4. c. 12. that vicars shall be endowed at the discretion of the ordinary, it has of course happened, that the right of a vicar to tythes is very different in different parishes.

**Cro. Eliz.** 462. In divers parishes, the vicars are only endowed with some particular tythes arising in their respective parishes.  
2 Roll. Abr. 335. pl. 6.

2 Roll. Abr. 335. pl. 1. pl. 4. In other parishes, the vicars are endowed with all tythes arising in their respective parishes, except such as are reserved in the deeds of endowment.

In other parishes, the vicars are endowed with all small tythes arising in their respective parishes.

**Cro. Eliz.** 633. It follows, that as the right of a vicar to tythes always depends upon the endowment of his vicarage, he ought, whenever his right is questioned, to shew himself entitled by endowment to the tythe he claims.  
2 Bulstr. 27. Bunb. 7. 72. 169.

2 Keb. 729. But, although a vicar cannot produce the deed of endowment, if he can shew, that he and his predecessors have constantly received the tythe by him claimed, this is evidence, that he has a right by endowment to tythe.  
Bunb. 7. 169.

**Hardr.** 329. In many deeds of endowment of vicarages a power is reserved to the archbishop, to increase the tythes of the respective vicarages ; and if such power be not reserved, an augmentation of the tythes may be made with the consent of or upon citing all parties, but not without notice or citation.  
**Twisse v.**  
**Blunt.**

*Ibid.* In consequence of this it has been holden, that if a vicar and his predecessors have for a long time received a tythe, which they were not entitled to under the deed of endowment, this, although the deed of augmentation be not produced, is evidence, that the vicarage has at some time been augmented with the tythe.

11 Rep. 13. Upon the dissolution of monasteries, the tythes of all churches  
**Elob.** 308. appropriated to the monasteries, and all portions of tythes belonging to them, were by divers statutes vested in the crown.

Much the greater part of these tythes have been since granted in fee by the crown.

All tythes so granted, except such as have been since given to the respective churches, are at this day due to the grantees of the crown, who are called impropriators.

[That a curate may hold tythes] It is in general true, that a chaplain, or a curate, is not entitled to tythe.

was determined in the Exchequer in 1790, in *Chamberlaine v. Humphreys.*]

**Litt. Rep.** A suit being brought for tythes by a chaplain to a chapel of ease, which was neither presentative nor donative, it was holden, that he was not entitled to any tythe.  
72. Anon.



It was insisted, that by the custom of the parish, the curate, after being appointed by the rector, was entitled to divers kinds of tythes: but it was holden, that these could not be due to him; because the rector might remove him at pleasure.

Noy, 15.  
Bott v. Bra-  
balon.  
Bunb. 273.  
Price v.  
Pratt.

A bill being brought by a perpetual curate for the recovery of divers small tythes, it appeared, that the chapel, of which he was curate, was annexed to the church of *Hemels Hempstead*; that he was nominated thereto for life, by the vicar of *Hemels Hempstead*, who in the instrument of nomination had given him the small tythes of the chapelry, with a power to sue him for the same in the vicar's name; and that he was licensed by the bishop. It was holden, that the plaintiff had no right to the tythes, because he had not a permanent interest in them; for that an appointment to a curacy, although expressly made for life, is revocable by the common law without any cause being shewn, and by the ecclesiastical law upon good cause being shewn.

But a curate, who comes in by institution from the ordinary, may be entitled to tythes.

An impropriator gave the tythes of a parish, all which belonged to his rectory, by will to the maintenance of the minister of the parish for ever; but did not give either the tythes, or the power of nominating the minister, to any person. This devise being void in law, because it was to no certain person, the heir at law nominated *A.* to be the minister. Afterwards upon the supposition of a lapse to the crown, *B.* was presented, instituted, and inducted. A question, to whom the tythes of the parish belonged, coming before a court of equity, it was decreed, that as *B.* came in by institution from the ordinary, although he was not, strictly speaking, either rector or vicar, they were due to him.

2 Ch. Ca.  
19. 31.  
Perne v.  
Oldfield.

Personal tythes are to be paid in the parish wherein the person who is to pay them lives.

Sheph. Abr.  
1013.

If cattle, for which an agistment tythe is due, have been sometimes depastured in one parish, and at other times in another, tythe must be paid in each parish, in proportion to the time they were therein depastured.

Bro. Disin.  
pl. 16.

By the 2 *Ed. 6. c. 13. § 3.* it is enacted, "That every person, which shall have any beasts, or other tythable cattle, going, feeding, or depasturing in any waste or common, whereof the parish is not certainly known, shall pay tythes for the increase of the said cattle to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies of the said parish, hamlet, town or other place, where the owner of the said cattle dwelleth."

The tythe of lambs is to be paid in the parish wherein the sheep yeap, although the sheep have been fed in two or more parishes.

Bunb. 139.  
Boys v.  
Ellis.  
12 Mod. 497.

No predial tythe, which would, if the corn or other thing from which it arises had been severed before the death of the rector or vicar of the parish, have been due to the rector or vicar, is due

1 Roll. Abr.  
655. pl. 3.  
2 Bullstr. 134.

to the executor of the rector or vicar: but the person, who succeeds to the benefice, is entitled thereto.

### (G) To whom extraparochial Tythes are to be paid.

2 Inst. 647. **A**LL tythes, arising in an extraparochial place, are by the canon law to be paid to the bishop of the diocese, in which the place lies.

Bro. Distro. pl. 10. But by the common law all such tithes are to be paid to the king.  
2 Inst. 647.  
2 Reli. Abr. 657. pl. 2. pl. 5.

Ante, p. 64. As the appropriation of tythes, in consequence of the decretal epistle of Pope *Innocent* the Third, extended only to parochial tythes, all the tythes of extraparochial places continued to be due to the king.  
Cro. Eliz. 513.

And consequently all extraparochial tythes, of which no grant has been made, are at this day due to the king.

### (H) Of the Right to a Portion of Tythes in a Parish.

Ante, p. 64. **B**EFORE the tythes of parishes were, in consequence of the decretal epistle of Pope *Innocent* the Third, appropriated to the persons having cure of souls in the respective parishes, it was a common practice, to grant the tythes of a whole manor, or of a particular farm, to any spiritual person, or to any spiritual corporation, and to his and their successors.  
2 Inst. 641.  
Bunb. 190.

A stop was, by the appropriation of parochial tythes, put to this practice: but as the right to tythes, which had been before thus granted, continued in the spiritual person or corporation, and in his and their successors; (the) tythes thus granted, in order to distinguish them from the other tythes of the parish, have been always called portions of tythes.

Some portions of tythes do at this day continue in the hands of the successor to the spiritual person or corporation to whom they were at first granted.

Others, which came to the crown upon the dissolution of monasteries, are at this day in the hands of the king, or the grantees of the crown.

2 Inst. 647. Hence it frequently happens, that a spiritual person has a right to a portion of tythes, in a parish of which he is neither rector nor vicar; and that an impropriator has a right to a portion of tythes, in a parish of which he is not impropriator.  
642. 653.

### (I) By whom Tythe is to be paid.

Hardr. 184. **I**T has been holden, that the owner of the cattle is liable to pay the tythe due for depasturing them.  
Pory v. Wright,  
Pasch. 13 Car. 2.

But

But in a modern case in the court of Exchequer it was holden, that only the occupier of the land is liable to pay tythe for depasturing cattle; although the cattle are the property of a stranger.

Bunb. 3.  
Underwood  
v. Gibson,  
Hil. 2 G. 1.  
[*Supra.*]

And in a note at the bottom of the latter case it is said to have been settled, in the case of *Fisher and Leman*, M. 7 G. 1. that in general only the occupier of the land is liable to an agistment tythe: but that in the case of a common, the owner of the cattle is liable thereto; because the owner of the soil has no profit from depasturing the cattle.

It is laid down in one case, that the person who buys corn of the grower, is not liable to pay the tythe thereof; because he may not be known to the parson.

Noy, 150.  
Baker's  
case, Trin.  
44 Eliz.

But it is in another case laid down, that the vendee of standing corn is liable to pay the tythe thereof.

Cro. Ja.  
362. *Moy's*  
v. Ewer, Mich. 10 Ja. 1.

And the latter seems to be the better opinion; for in two other cases it is laid down, that the vendor, who after selling his corn had severed it by order of the vendee, should pay tythe thereof; because it was sold in a secret manner.

Brown, 34.  
Helo v. Fre-  
tenden.  
2 Buller.  
184.

From whence it may be fairly inferred, that, if the corn had been sold in an open manner, the vendee would have been liable to pay tythe thereof.

## (K) What Tythes are to be deemed small Tythes.

AS the vicars are in many parishes endowed with all small tythes, questions frequently arise, whether the tythes of certain things are small tythes.

But such questions can only arise concerning things of which a predial tythe is due; for it is universally agreed, that every personal, and every mixed tythe, is a small tythe.

It was the opinion of *Holt*, Chief Justice, that in order to distinguish, whether the tythe of a particular thing be a great or small tythe, regard must be had to the place where the thing from which it arises, grows: for that if corn grow in a garden the tythe thereof is a small tythe; and *vice versa*, that if a thing, the tythe of which is in general a small tythe, grow in a field, the tythe thereof is a great tythe.

12 Mod. 41.  
Wharton v.  
Lisle, 3 Lev.  
365.  
Skin. 341.

But it was holden by the opinion of the other Justices, *Eyre*, *Dolben*, and *Gregory*, that the nature of the thing, from which the tythe arises, is only to be considered; and that the tythe of corn, although grown in a garden, would, agreeably to what is laid down in *Moor* 909. be a great tythe.

It was however said in this case by *Dolben* and *Gregory*, that if a thing, the tythe of which is in general a small tythe, should be grown in the greater part of a parish, the tythe thereof would, agreeably to what is laid down in *Hut.* 78. be a great tythe.

But *Eyre* was of a different opinion as to this point.

The

The opinion of *Holt*, Chief Justice, was contrary to what is laid down in divers books; and the opinion of the three justices has been adhered to in two modern cases.

Cro. Eliz.  
467.

Bedingsfield  
v. Feak.

Hut. 78. Moor, 909.

It is in divers books laid down, that the tythe of saffron is a small one; although a field of forty acres be planted therewith.

MS Rep.

Smith v.

Wyatt,

Trin.

16 G. 2.

2 Atk. 365.

S. C.

In one of the modern cases the question was, Whether the tythe of potatoes, planted in fields in a parish to the amount of three hundred acres, is a small tythe? It was holden to be so. And by Lord *Hardwicke*, Chancellour—It seems to me, that in the case of *Wharton* and *Lisle*, *Holt*, Chief Justice, did ultimately acquiesce in the opinion of the other three judges; for if he had not, the judgment would scarce, as was done, have been given in his absence, and upon the first argument. The distinction betwixt a great and small tythe was at first founded upon the quantity of the thing from which it arose. Thus the tythes of corn, and some other things, were called great tythes: because these things usually grew in large quantities. On the other hand, the tythes of flax, and some other things, which generally grew in small quantities, were called small tythes. Whenever the cultivation of a new thing has been introduced, the method has been to denominate the tythe thereof great or small from its similitude to other things, the tythes of which are great or small: but it would be productive of great uncertainty to hold, that a tythe, which has once obtained the denomination of great or small, should be liable to a new denomination, from the quantity of the thing from which it arises, or from the place where it grows. It has been said, that if neither the quantity of the thing, nor the place in which it grows, ought to be regarded, the value of great tythes may, by growing only those things in a parish which are liable to the payment of small tythes, be reduced to almost nothing. This is very true, and it is an inconvenience: but it is one which must be submitted to by all who have estates in tythes; because it arises from the transitory and fluctuating nature of such estates.

MS. Rep.

Sims v.

Barnett,

Mich.

1 G. 3.

Skin. 341.

In the other modern case it was laid down by Lord *Henley*, Keeper, that the difference betwixt a great and small tythe depends entirely upon the nature of the thing from which it arises.

It is said to have been ruled at an assize, that the tythe of clover seed is a great tythe; because clover seed is a species of grain.

Eunb. 344.

But it has been decreed by the court of Exchequer, that the tythe of clover seed is a small tythe.

3 Roll. Abr.

643. pl. 11.

It has been holden, that the tythe of flax is a small tythe.

12 Mod. 41. 3 Lev. 365.

Skin. 341.

3 Keb. 419.

Bunb. 79.

344.

The tythe of hay is not a small tythe, but vicars are in many parishes entitled thereto by endowment.

And

And if a vicar be entitled by endowment to the tythe of hay made of grafs, he is likewise entitled to the tythe of hay made of clover, sainfoin, or any other thing of the like kind, although the cultivation of the thing has been introduced since the endowment of his vicarage: because every one of these things is a species of grafs.

Hutt. 78.  
Skin. 341.  
3 Keb. 419.  
Bunb. 79.  
344.

The tythe of hops has been holden to be a small tythe.

Sid. 443.  
Crouch v. Ridsen. Bunb. 79.

The tythes of peas and beans are in general great tythes: and if a vicar be entitled to the tythe of either of these, it is by endowment.

A bill being brought for the tythes of peas and beans, sowed and set in rows, drilled, hoed, and hand-weeded in a garden-like manner, as being small tythes; the defendant insisted, that peas and beans, cultivated in this manner, had usually been grown in a great part of the parish; and that tythes thereof had never been paid to the vicar. It was decreed, without going into the consideration of the quantity grown in the parish, that as no endowment of these tythes was produced, nor any receipt of them by the vicars proved, the bill should be dismissed.

Bunb. 170.  
Gumley v. Birt.

In a very late case a bill was brought for the tythes of peas and beans, grown in fields; gathered by hand while green; and sold in markets. It was said for the plaintiff, that, although the tythes of the peas and beans would, if they had stood till they were ripe, have been great tythes, by gathering the peas and beans before they were ripe, and by hand, they became small tythes. The decree was, that the tythe was a great tythe. And by Lord *Henley*, Keeper—The difference betwixt a great and small tythe depends entirely upon the nature of the thing from which it arises. It would be strange to hold, that the gathering of a thing at one time should make the tythe thereof a small tythe, which would, if the thing had been gathered at another time, have been a great tythe; it has been expressly determined, in the case of *Hodgson v. Smith*, Bunb. 279. that the tythe of tares, whether cut green or ripe, is a great tythe. It was holden, in the case *Gumley v. Birt*, Bunb. 170. that the mode of cultivating land for the growing of peas or beans did not make the tythe thereof a small tythe; and there is surely less reason to hold, that the mode of gathering peas or beans should make the tythe thereof a small tythe.

MS. Rep.  
Sims v.  
Barnett,  
Mich. 1 G. 3.

If a vicar be entitled by endowment to the tythe of peas and beans, he is entitled to such tythe, in what way soever the land upon which they grow is cultivated.

A bill being brought for the tythes of peas and beans, the defendant insisted, that the vicar was only entitled to the tythes of peas and beans grown in fields, when the ground had been turned with a spade: but it was decreed by the court of Exchequer, that he was also entitled to the tythes of peas and beans grown in fields, when the ground had been turned with a plough; and the decree was affirmed in the House of Lords.

Bunb. 19.  
Nicholas v.  
Elliot.  
2 Br. P. C.  
31. S. C.  
under the  
name of  
Huften v.  
Nicholas.

It has been decreed, that the tythe of potatoes is a small tythe.

MS. Rep.  
*Smith v. Wyat*, Trin. 16 G. 2. 2 Atk. 365. S. C.

Cro. Eliz. The tythe of saffron has been holden to be a small tythe.  
467. Bedingfield v. Feak, Hut. 78.

Cro. Car. It has been holden, that the tythe of wood is a small tythe.  
28. Udall v. Tindall, Sid. 447.

1 Roll. Abr. The tythe of wood is in general a great tythe; but in some  
643. U. parishes it is a small tythe.  
pl. 2.

(L) How far the Custom of a Parish is to be regarded in the setting out of Tythes.

IT is by divers statutes provided, that tythes shall be paid according to the usages and customs of the respective parishes, in which they arise.

By the 27 H. 8. c. 20. § 1. it is enacted, "That every person, according to the laudable usages and customs of the parish, or other place where he dwelleth, shall yield and pay his tithes and other duties of holy church."

By the 32 H. 8. c. 7. § 2. it is enacted, "That all persons, shall fully, truly, and effectually divide, set out, yield, or pay, all tythes, according to the lawful customs, and usages of the parishes or places, where such tythes or duties shall grow, arise, come, or be due."

By the 2 & 3 Ed. 6. c. 13. § 1. after enacting, that the statutes made in the twenty-seventh and thirty-second years of the reign of the late King Henry the Eighth, concerning the true payment of tythes and other duties, shall abide in their full strength and virtue, it is further enacted, "That all persons shall truly and justly, without fraud or guile, yield and pay all manner of predial tythes, in their proper kind, as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid."

And by § 8. it is enacted, "That in every place the same custom of payment of personal tythes, which had been observed within forty years before the making of this act, shall be observed and continue."

Cro. Ja. The limitation in this statute, to forty years before the making  
454. thereof, agrees with the ecclesiastical law, by which if any tythe  
Dobitshoe v. had been paid in a certain way for the space of forty years, such  
Carteen. payment would have made a good custom against the church.

The construction of these statutes has constantly been; that a custom of a parish as to the payment of tythes is not to be regarded, unless it be a reasonable one.

1 Sid. 278. Wherever the tythe of a thing is due of common right, as  
1 Lev 179. of wheat, a custom of a parish to pay less than the tenth part  
Ld. Raym. for tythe, is bad; because this custom, which amounts to a pre-  
359. scription in *non decimando* as to part of the thing, is unreasonable.  
12 Mod.  
206. 1 And. 199.

Nov, 108. But, where the tythe of a thing is due by custom, as of fish  
Holland v. taken in the sea, a custom of a parish to pay less than the tenth  
Heale, part

part is good; and indeed there seems to be no way, except by the custom, of ascertaining what is to be paid for a tythe, which is only due by custom. 1 Sid. 278.  
1 Lev. 19.

It was alleged, that by the custom of a parish, the tenth part was without fraud to be delivered to the rector, in full satisfaction for the tythe of wool; and that this was to be delivered *absque visu et tactu novem partium ejusdem lanæ per rectorem*. The custom was holden to be unreasonable: for although it be alleged, that the tenth part of the wool was to be delivered without fraud; yet this is to be delivered in such manner, as is extremely liable to fraud. It is moreover contrary to reason, that the person who is to pay tythe should be the sole judge, whether it be justly paid. Hob. 107.  
Wilson v. The Bishop of Carlisle, Bunb. 321.

The custom was, that the tenth sheaf of such corn as was bound up in sheaves was to be paid in full satisfaction for the tythe of all corn grown upon certain lands. This was adjudged a bad custom: because it admits of the paying as little for tythe of corn as the occupier pleases; for he may choose how much of the corn he will bind up in sheaves. 1 And. 199.  
Adam's case.

In a suit for subtracting tythe, the defendant alleged, that by the custom of a farm, the occupier of the farm, after having set out the tythe of corn, was to take back thirty sheaves of the tythe. As it was not averred, that the farm was a large one, this custom was holden to be bad: for if it were a small farm, there might be no more than thirty sheaves set out for tythe, in which case the parson would have no tythe. Godb. 234.  
Jacks v. Cavendish.

It was alleged, that by the custom of a parish, when certain lands are sown with corn, the parson is to have for tythe the corn grown upon every tenth land, beginning to reckon from the land next the church. It was holden that this custom, which puts it into the power of the occupier, by neglecting to manure and sow the tenth lands properly, to make the tythes thereof worth very little, is unreasonable, and therefore bad. 1 Leon. 99.  
Stebbs v. Goodlake.  
Moor, 913.  
2 P. Wms. 569.  
Vin. Abr. tit. Dismes, B. 2. pl. 17.

[A custom of a parish to tythe wheat by throwing aside every tenth sheaf, as the corn is about to be carried, is bad.] Tennant v. Stubbing, Anstr. 841.

The custom of a parish was to pay tythe in kind of sheep, if they were kept a whole year in the parish; but if they were sold before shearing-time, only a halfpenny was to be paid for the tythe of each sheep. This was adjudged an unreasonable custom; for thereby the tythe of sheep may, at the owner's pleasure, be made worth very little. March, 79.  
Weedon v. Harding.

It was alleged, that by the custom of a parish the tenth lamb was to be paid, for the tythe of all lambs yeaned in the parish; and that in consideration of this, no tythe was to be paid for ewes depastured in the parish, which did not yeane therein. This was holden to be a bad custom; for, by taking the ewes out of the parish a little before the time of yeaning, the parson may be deprived of his tythe of sheep. 12 Mod. 498.  
Selly v. Bank.

A custom to pay tythes of lambs upon *Saint Mark's* day was holden to be unreasonable: because at that time lambs are in the general so young, that they are not able to live without their dams. Bunb. 233.  
Reignolds v. Vincent.

(M) Of the Time and Manner of paying personal Tythes, where there is no Custom in a Parish.

BY the 2 & 3 Ed. 6. c. 13. § 7. it is enacted, "That every person, liable to the payment thereof, shall yearly at or before *Easter*, pay for his personal tythe, the tenth part of his clear gain, his charges, and expences according to his estate, condition, or degree, to be therein abated, allowed, and deducted."

1 Eq. Ca.  
Abr. 366.  
Newn v.  
Chamberlain.  
1 Br. P. C.  
157. S. C.  
Bunb. 174.

It was determined in the House of Lords, upon an appeal from the court of Exchequer, that the occupier of a corn mill is only liable to pay, for his personal tythe, the tenth part of his clear profit, after the charge of erecting the mill, and the expences of horses, servants, and all other things are deducted.

It is said to have been the opinion of *Gilbert*, Chief Baron, that *Easter* offerings were at first a compensation for personal tythes.

Bunb. 173.  
198.  
Ambl. 72.  
S. P.

And this opinion seems to be confirmed, by two late cases in the court of Exchequer; in which the court unanimously agreed, that *Easter* offerings are due of common right.

For it cannot reasonably be supposed, that an *Easter* offering is due of common right, unless it be at the same time supposed, that it was at first paid in lieu of something due of common right; and it seems more probable, that it was at first paid in lieu of the tythe of personal labour, than of any other thing.

(N) Of the Time and Manner of setting out predial Tythes, where there is no Custom in a Parish.

Fitz. N. B.  
53.  
Bro. Dism.  
pl. 16. 2 Inst. 652. 11 Rep. 16.

IT is laid down in divers books, that only one predial tythe can be due in the same year from the same land.

But it seems to be now settled, that more than one predial tythe may be due from the same land in the same year.

1 Roll. Abr.  
640. pl. 11.  
Pasch.  
41 Eliz.

It was holden many years ago, that tythe is due of aftermowth hay.

Bunb. 10.  
Benson v.  
Watkins.  
Hil. 3 G. 1.

It was holden by the court of Exchequer in a modern case, that garden grounds shall pay tythes of the different crops produced in the same year; and that tythe is due of turnips when pulled, although they grow upon land which has in the same year paid tythe.

Bunb. 314.  
Swinfen v.  
Digby, Hil.  
5 G. 2.

And in a still later case it was holden, by the same court, that if land be sown with turnips in the same year that tythe of corn grown thereon has been paid, and be fed with sheep or any unprofitable cattle, tythe is to be paid of the turnips.



It was indeed in one case holden, that no tythe is due of after-mowth hay: but the reason given in this case, for such hay being exempted from the payment of tythe, is, that, by the custom of the parish, the occupier was to bestow some extraordinary labour about the tythe of the first crop of hay.

Cro. Ja. 42.  
Hall v.  
Fettyplace.

It is laid down in one case, that a predial tythe is to be set out, as soon after the corn or other thing of which it arises is severed, as this can well be done, if there be no custom to the contrary.

Freem. 335.  
Anon.

And it is in another case said, that if a man, either negligently or with design, suffer apples to hang longer upon the trees than they ought to hang, and they should be stolen, he shall account for the tythe thereof.

Hetl. 100.  
Anon.

In a modern case in the court of Exchequer, it was said by the court, that all the wheat growing in a field must be cut down, before the tythe of any part of the wheat can be set out.

MS. Rep.  
Mather v.  
Holmwood,  
Mich. 5 G. 3.

In a subsequent case in the same court, wherein a question was, Whether all the wheat growing in a field must be cut down, before the tythe of any part of the wheat can be set out, the case of *Mather v. Holmwood* was cited, and relied upon by the counsel for the plaintiff, as a determination in point. The late Mr. *Huffey*, after opening for the defendant, observed, th the question was not, according to his recollection, much argued in the case of *Mather v. Holmwood*; for that, some circumstances of fraud appearing in that case, he, who was of counsel with the defendant, recommended it to his client, to submit to a decree, for accounting for the tythe in question without costs. Having observed this, he, with that delicacy and candour for which he was most remarkably distinguished, begged to be informed by the court, whether he was precluded, by any thing which fell from the court in the case of *Mather v. Holmwood*, from arguing the question in the present case. Hereupon *Parker*, Chief Baron, said, that it was the desire of the court, to have the question, it being a question of the utmost importance, fully argued; and, which shewed true greatness of mind as well as goodness of heart, he added, that, for his own part, he should be glad to reconsider the question, in order to have an opportunity, in case he should see reason for it, of departing from an opinion he had for some time entertained. After hearing the question fully argued, and taking time to consider, the opinion of the court was, that it is not necessary to cut down all the wheat growing in a field, before the tythe of any part of the wheat is set out; and that the tythe may be set out, as often as a reasonable quantity of the corn growing in a field is cut down. Another question in this case was, Whether all the barley or oats growing in a field must be cut down, before the tythe of any part of the barley or oats can be set out? The opinion of the court was—That it is not necessary to cut down all the barley or oats growing in a field, before the tythe of any part can be set out; and that the tythe may be set out as often as a reasonable quantity of the corn growing in a field is cut down. The court did not ascertain what is a reasonable quantity of corn

MS. Rep.  
Ereskine v.  
Russe,  
Mich.  
9 G. 3.

to be cut down, before any tythe is set out. So far from doing this, it was said, that it could not be done; inasmuch as it must always depend upon the circumstances of the particular case, whether the tythe was set out before a reasonable quantity of corn was cut down.

By the 2 & 3 Ed. 6. c. 13. § 2. it is enacted, "That at all times and as often as predial tythes shall be due, and at the tything-time of the same, it be lawful to every party, to whom any of the said tythes ought to be paid, or his deputy or servant, to view and see their said tythes to be justly and truly set forth and severed from the nine parts."

1 Roll Abr.  
643. X.  
pl. 1.  
2 Ventr. 43.  
Bunb. 333.  
Beaver v.  
Spratley.  
Hil. 7 G. 1.

But it is not necessary, for the occupier of land to give notice to the person entitled to a predial tythe, or to give notice in the church, at what time he intends to set the same out.

And in a modern case *Carter and Comyns*, Barons, were of opinion, that even a custom of a parish, to give notice at what time a predial tythe is to be set out, would be unreasonable: for the person entitled to the tythe may live at the distance of a hundred miles from the parish.

But *Reynolds*, Chief Baron, was of opinion, that such a custom would be good; because notice to a servant would in that case be sufficient.

The general rule, as to the manner of paying a predial tythe, is, that the tenth part of the thing, from which it arises, is to be justly and truly set out upon the land upon which it arises.

In some cases the manner of setting out a predial tythe is ascertained by judicial determination.

1 Sid. 283.  
Ledgar v.  
Langley.  
Bunb. 186.  
Boughton v.  
Wright.  
1 Sid. 283.  
Ledgar v.  
Langley.

It has been holden, that every tenth sheaf of corn is to be set out for the tythe thereof.

2 Atk. 136.  
Archbishop  
of York v.  
Sir Miles  
Stapleton.  
Bunb. 186.  
Boughton v.  
Wright.

And it was said *arguendo*, that the sheaves, set out for tythe of corn, ought to be marked with a green bough.

The occupier of land is not of common right obliged to gather the sheaves of corn, which have been set out for tythe, into shocks.

But he may by custom be obliged to do this, and the person, having a right to the tythe, may at any time bring a bill in a court of equity for the establishment of the custom.

Before the nine sheaves of the occupier of the land are put into a carriage to be carried away, the whole ten are to be set out upon the ground, that the person entitled to the tythe thereof may have an opportunity of judging whether the same be fairly set out.

M.S. Rep.  
Ereskine v.  
Ruffie,  
Mich.  
9 G. 3

In a very late case in the court of Exchequer, the opinion of the court, upon great consideration, was, that unless there be a custom of the parish to set the tythe of barley out in some other manner, the barley must be gathered into cocks, and every tenth cock must be set out for tythe.

Freem. 329.  
Anon.

In one book it is laid down, that tythe for depasturing cattle is to be paid for, at the rate of two shillings in the pound of the money received for the depasturing.

But

But it seems to be the better opinion, that tythe for depasturing cattle is to be paid for at the rate of two shillings in the pound of the annual value of the land whereon the cattle were depastured. Hardr. 184.

It is in one case laid down, that the tythe of grafs mowed is to be set out before it is made into grafs-cocks. Hob. 250.  
Hide v. Ellis,  
Hil. 16 Ja. 1.

But it was in a modern case holden, that the tythe of grafs mowed is not to be set out until it is made into grafs-cocks. [2 P. Wms. 523. In a note on this case by the editor it is said, the tythes are called the tythes of hay, and not of grafs. 3 Burn. Eccl. Law, 441.]

[Where by the usual mode of husbandry clover-hay is not made into cocks at all, the tythe may be set out in the swathe.] Collyer v. Howes, Anfr. 48 f.

The person, entitled to the tythe of grafs mowed, is to be allowed a convenient time for making it into hay upon the land on which it grew. Bro Dism. pl. 12.  
1 Roll. Abr. 643. X. pl. 2. Str. 245.

It was formerly doubted, whether the tythe of hops were to be set out, by the tenth hill as soon as the binds were severed from the ground, or by the tenth measure after the hops were picked. Sid. 283.  
Ledgar v. Langley, Pasch. 18 Car. 2.

But it has been determined in two cases, that the tythe of hops is to be set out by the tenth measure, after they are picked. Bunb. 20.  
Chilly v. Reeves, Trin. 2 Ja. 2. Bliss v. Chandler, Mich. 7 G. 1.

The same was determined in a modern case by the court of Exchequer; and the decree of this court was affirmed upon an appeal to the House of Lords. MS. Rep. Tyers v. Walton, in Dom. Proc. 15 May 1753. [Knight v. Halfey, 7 Term Rep. 86. S. P.]

In some cases the manner of paying a predial tythe is ascertained by acts of parliament.

By the 11 & 12 W. 3. c. 16. it is for the better ascertaining the tythes of hemp and flax enacted, "That every person, who shall thereafter sow any hemp or flax, in any parish or place within *England, Wales, or Berwick upon Tweed*, shall pay to the parson, vicar, or impropriator of such parish or place, yearly, the sum of five shillings and no more, for each acre of hemp or flax, before the same is carried off the ground, and so in proportion for more or less ground so sown."

By the 31 G. 2. c. 12. it is for the encouragement of the growth of madder enacted, "That every person, who shall thereafter plant or cultivate any madder, in any parish or place within that part of *Great Britain* called *England*, shall pay to the parson, vicar, curate, or impropriator of such parish or place, yearly, the sum of five shillings and no more, for each acre thereof, and so in proportion for more or less ground so planted or cultivated, in lieu of all manner of tythe of the said madder."

But it is in both these statutes provided, that nothing therein contained shall extend to charge any land, which is discharged of tythe by a *modus*, an ancient composition, or otherwise.

Lat. 24.  
Stilman v.  
Cromer.

Although two persons are entitled to moieties of a predial tythe, the occupier of the land is not bound to set it out in moieties; for it is the duty of the persons, to whom the tythe is due, to divide it after it is set out.

(O) Of the Time and Manner of setting out or paying mixed Tythes, where there is no Custom in a Parish.

Freem. 335.  
Anon.

IT is in general true, that mixed tythes, which arise from things inanimate, are to be set out or paid, as soon as they can conveniently be severed from the nine parts.

The general rule as to the manner of setting out a mixed tythe, arising from an inanimate thing, is, that the tenth part of the thing is to be set out at the place where it arises.

But the manner of setting out mixed tythes has, in some cases, been ascertained by judicial determinations.

Raym. 277.  
Dod v.  
Engleton.

The tenth meal of milk of all a farmer's cows is to be set out for the tythe of milk; for if the person, entitled to tythe of milk, should be obliged to send for the tenth part of every meal, it would very often be not worth the sending for.

Bosworth v.  
Limbrick,  
2 Rayn. 825.  
Hutchins v.  
Full, 3 Rayn.  
1010.

[It is now settled, that the mode of setting out tythe milk is, that the entire tenth meal of the whole herd of cows should be set forth every tenth day, both morning and evening meal, at one and the same time.]

Raym. 277.  
Dod v.  
Engleton.  
Id. Raym.  
359. Hill  
v. Vaun.

It has been decreed, that the tythe of milk is to be carried by the parishioner to the parsonage-house.

But *Holt*, Chief Justice, was of opinion, that the parishioner is only obliged to set out the tythe of milk; and he said, that that decree in *Dod* and *Engleton* was rather an equitable one, and founded upon the custom of the neighbouring parishes.

Bunb. 73.  
Dodson v.  
Oliver,  
Pasch.  
3 G. 1.  
Ambl. 72.  
S. P.

And in a modern case, the whole court of Exchequer were of opinion, that the parishioner is only obliged to set out every tenth meal of milk at the usual place of milking; that the person entitled thereto ought to fetch it away in his own pail or vessel; and that, if he do not fetch it away before the next milking time, the parishioner may pour it on the ground; because he may then have occasion for the pail or vessel in which it was set out.

12 Mod.  
498.

The tenth part, by weight, is to be delivered for the tythe of wool.

Bunb. 133.  
Reignolds v.  
Vincent.

Such mixed tythes as arise from the young of beasts, birds, or fowls, are in general to be set out or paid as soon as the young beasts, birds, or fowls can well live without the old ones.

12 Mod.  
497. Selby v.  
Bark, Pasch.  
13 W. 3.

It has been holden, that tythe is not to be paid for any number of young beasts, birds, or fowls under ten; but that this number is to be carried over to the account of the next year.

Bunb. 198.  
Fegerton v.  
Still, Trin.  
12 G. 1.

But in a modern case, it was decreed by the court of Exchequer, that if the number of young beasts, birds, or fowls be under ten, this number is not to be carried over to the next year's account, but the tenth part of the value thereof in money is to be paid for tythe.

(P) Of the Time and Manner of paying Tythes  
due by Custom.

IT is in general true, that where a tythe is due by custom, the time and manner of paying it are ascertained by the custom; and indeed there seems to be no other way, than by the custom, to ascertain the time and manner of paying a tythe, which is only due by custom.

But the time and manner of paying tythes of houses in *London* are ascertained by statutes.

By the 37 *H. 8. c. 12. § 2.* it is enacted, "That the inhabitants of the city of *London* shall yearly, without fraud or covin, pay their tythes to the parsons, vicars, and curates of the said city, after the rate following, that is to wit, of every ten shillings rent by the year of every house within the said city sixteen pence halfpenny, and of every rent of twenty shillings of every such house two shillings and ninepence."

And by § 11. it is enacted, "That the said inhabitants shall pay their tythes quarterly, by even portions."

But by § 18. it is enacted, "That where a less sum, than is by this act directed to be paid for tythe, hath been accustomed to be paid for the tythe of any house, that then the inhabitant of such house shall pay tythe, only after such rate as hath been accustomed."

By the 22 & 23 *Car. 2. stat. 2. c. 15. § 1 & 2.* after reciting, that tythes in the city of *London* were paid with great inequality, and are since the late dreadful fire, in rebuilding the same, by taking away of some houses, altering the foundations of the others, and the new erecting of others, so disordered, that in case they should not, for the time to come, be reduced to a certainty, many controversies and suits of law might thence arise, it is enacted, "That an annual certain sum of money therein mentioned shall in lieu of tythes be paid, in all the parishes within the said city, whose churches have been demolished or in part consumed by the late fire."

And by § 3. it is enacted, "That the respective sums of money, to be paid in the said respective parishes, and assessed as therein is directed, shall be deemed and taken to be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests, to the respective parson, vicar, or curate of any parish, or to the successors) of the respective parsons, vicars, or curates, who shall be legally instituted, inducted, and admitted into the said respective parishes."

By § 10. it is enacted, "That the impropricator or impropriators of any of the said parishes shall pay, and allow, what really and *bonâ fide* they have used and ought to pay and satisfy, to the respective incumbents of such parishes at any time before the said fire, and the same shall be esteemed and computed, as part of the maintenance of such incumbent."

(Q) In what Cases the Payment of Tythes may be suspended.

1. Of the Produce of Lands in the King's Hands.

**Cro. Eliz. 511. Wright v. Wright.** IT is laid down in one case, that the king is exempted, by virtue of his prerogative, from the payment of tythes.

**Hardr. 315. Compost's case.** But in another case it was holden, that even the demesne lands in the crown are not exempted, by virtue of the prerogative, from the payment of tythes.

**1 Jon. 387. Earl of Hertford v. Leech.** Tythes are not due of the produce of lands in the king's hands; because the appropriation of parochial tythes does not extend to such lands.

**1 Jon. 387. Earl of Hertford v. Leech. Cro. Eliz. 511.** The privilege, however, of being exempted from the payment of tythes is personal to the king; and does not extend either to his grantee or lessee.

2. Of the Produce of Lands which have been barren.

By the 2 & 3 Ed. 6. c. 13. § 5. it is enacted, "That all barren heath or waste grounds, other than such as be discharged of the payment of tythes by act of parliament, which before this time have paid no tythes by reason of their barrenness, and now be, or hereafter shall be, improved and converted into arable ground or meadow, shall from henceforth, after the end of seven years next after such improvement, pay tythes of the corn and hay growing upon the same."

**2 Inst. 656.** There is not in this statute an express suspension of the payment of tythes, for the lands therein mentioned; but there is certainly an implied suspension, for the space of seven years next after the improvement of the lands.

**2 Inst. 656. Freeman 335. 6 Mod. 96. Ld Raym.** It has been constantly holden, that only such land is barren, within the meaning of this statute, as produces nothing profitable by reason of its natural barrenness.

**991. 3 Bulstr. 166. [Stockwell v. Terry, 1 Vez. 115. 2 Rayn. 445.]**

**Cro. Eliz. 475. Sherington v. Fleetwood.** If land, which has from time immemorial been full of bushes, be grubbed, and converted into arable ground or meadow, tythes of the corn and hay thereupon grown are immediately due; because the land was not naturally barren, but became so by negligence.

**Eunb. 1:9. Beardmore v. Gilbert. 3 Bulstr. 165.** If wood land be grubbed, and converted into arable ground or meadow, tythes of the hay and corn thereupon grown become due immediately.

**Roll. Rep. 39. Mafcal v. Price.** Tythes are due immediately of the corn and hay grown upon broom-land, which has been grubbed and converted into arable ground or meadow.

**3 Bulstr. 305.** If land, which has from time immemorial been overflowed by the sea, be drained, the payment of tythes of the corn and hay grown

grown upon this land is not suspended; because the land was not in its nature barren, but became so by accident.

Wit v.  
Buck. Cro.  
Eliz. 475.

This statute does not suspend the payment of any tythes, which were paid before the improvement of the land.

For by § 6. it is enacted, "That if any barren heath or waste ground hath before this time paid any tythes, and the same be hereafter improved and converted into arable ground or meadow, the owner thereof shall, during the seven years next after the same improvement, pay such kind of tythes as were paid for the same before the said improvement."

### 3. Of the Produce of Glebe Lands.

So long as the rector of a parish holds his glebe in his own hands, the payment of small tythes arising thereupon is suspended; notwithstanding the vicar of the parish is endowed of all small tythes arising in the parish: for the maxim is, *ecclesia decimas solvere ecclesiæ non debet*.

Cro. Eliz.  
47. 578.  
Lutw. 1062.

But if a rector let his glebe, the tenant is liable to pay the small tythes arising thereupon to the vicar, and the great to the rector.

Bro. Dism.  
pl. 17.  
Cro. Eliz.  
479. 578.  
1 Brownl.  
69. Harris  
v. Cotton.

For the same reason the vicar of a parish shall not during the time he occupies his own glebe pay any tythes, arising thereupon, to the rector or impropiator of the parish.

But, if a vicar let his glebe, the tenant is liable to pay the great tythes arising thereupon to the rector or impropiator, and the small to the vicar.

Ibid.

An impropiator is likewise exempted from the payment of the small tythes arising upon his glebe to the vicar, so long as it is in his own hands; for the maxim extends to him also.

But, if an impropiator let his glebe, the small tythes arising thereupon are due to the vicar, and the great to himself.

Franklin. Fitzg. 79.

If a rector, vicar, or impropiator, who has sown his glebe, die before the corn is severed, the executor of the rector, vicar, or impropiator must pay tythe thereof: for although an executor be in general the representative of his testator, he is not so in his spiritual capacity.

Hettl. 31.  
Booth v.  
Franklin.  
Fitzg. 79.  
Hettl. 31.  
Booth v.  
Franklin. Fitzg. 79.  
1 Brownl.  
69. Harris  
v. Cotton.

### (R) Of a *Modus decimandi*.

#### 1. In general.

A *Modus* is a real composition for tythe.

It is probable, that every *modus* had its commencement by deed: because a composition for tythe can never become a *modus*, unless the patron and ordinary be parties thereto, or it be confirmed by them.

Hardr. 381.  
Ingolby v.  
Ward. 2 P.  
Wms. 573.

A vicar and a parishioner had made an agreement, that, for the time to come, a certain sum of money should be paid annually in lieu of tythes; and it was confirmed by the bishop. This was

Mar. 87.  
Hitchcock  
v. Hitch-  
cock.

holden to be only a personal contract, and not such a real composition as would bind the successor to the vicar.

Ambl. 510.  
Attorney  
General and  
Blair v.  
Cholmley.

[An agreement by which the rector had an inclosure and allotment in lieu of his glebe and tythes, was holden to be no bar to the successor's claim of tythes, though the ordinary was a party to it; and it was sanctioned by a decree in equity. To this agreement it should be observed, that the patron was not a party, that the decree was by consent, and nothing was allowed as a compensation for tythes upon improvements *in futuro*.]

11 Rep. 19.  
Graunt's  
case. 2 Mod.  
321. Cro.  
Ja. 501.  
2 P. Wms.  
573.

A *modus* may be prescribed for, without producing the deed, by which the composition was at first agreed upon: for wherever there has been, for time immemorial, a constant annual payment in lieu of tythe, it shall be intended that the payment had a proper commencement.

A *modus* is not good, unless the composition were at first reasonable.

2 P. Wms.  
573, 574.  
Chapman v.  
Monson.

It is not, however, at this day necessary to shew that the composition was at first reasonable: for there might be, when the composition was agreed upon, some circumstance which then made it reasonable, although this cannot, at so great distance of time, be shewn.

A *modus* must, at its commencement, have been a recompence to the person to whom the tythe was due in lieu of which it was to be paid.

1 Roll. Abr.  
649. pl. 8.

If a man prescribe to be discharged of tythe, in consideration of being obliged to repair the body of the church, this is not a good *modus*; because, as the parson was never obliged to repair the body of the church, this could never have been a recompence to him.

1 Roll. Abr.  
650. pl. 9.

But, if a man prescribe to be discharged of tythe, in consideration of being obliged to repair the chancel, this is a good *modus*: for this must always have been a recompence to the parson, he being bound to repair the chancel.

2 P. Wms.  
573.  
Chapman v.  
Monson.

It is not at this day necessary, for the party who would avail himself of a *modus* to shew, that it was originally a recompence to the person to whom the tythe was due in lieu of which it was to be paid: for unless it appear, upon the face of the prescription, not to have been so, it shall be intended that it was.

Godb. 180.

It is laid down, that a *modus* by prescription may be good against a vicar.

2 P. Wms.  
522.

But the better opinion seems to be, that, as every *modus* by prescription must have begun at a time whereof there is no memory, no *modus* by prescription can be good against a vicar; because the endowment of all vicarages has been within time of memory.

1 Mod. 216.

It has been holden, that a *modus* by prescription, to be paid to the rector in lieu of all tythes arising in the parish, is a discharge of tythes as against the vicar.

The thing paid as a *modus* is usually a sum of money.

But



But the payment of a chattel as a *modus* is good; because the original agreement might as well have been, that a chattel should be paid in lieu of tythes, as that money should. Salk. 656. Ld. Raym. 360.

It is a good *modus* to prescribe, that the parson and his predecessors have, for time immemorial, been seised in fee of one or more closes of land lying in the parish; and have constantly received the profits thereof, in lieu of a particular species of tythe, or in lieu of all tythes arising in the parish. Hob. 42. Cro. Ja. 503. Cro. Eliz. 587. 736.

An indirect *modus* is good.

A suit being instituted for tythes in kind by the parson of *B.* the defendant moved for a prohibition; and insisted, that he was an inhabitant of the parish of *A.*, that every inhabitant of the parish of *A.*, who held any pasture land in the parish of *B.*, had, for time immemorial, paid tythes thereof to the parson of *A.*, and that the parson of *A.* had always paid two pence for every acre of such pasture to the parson of *B.* A prohibition was granted. And by the court—It is exactly the same thing, as if the defendant had prescribed directly for a *modus* of two pence for every acre of pasture occupied by him in the parish of *B.* Cro. Eliz. 136. Cotford v. Pease.

Tythe is so absolutely and effectually discharged by a *modus*, that although this be not paid, the right of taking the tythe in kind cannot be again resorted to. Hob. 41. 42. 44.

If a man through ignorance set out corn for tythe, upon land discharged of tythe by a *modus*, and the parson take it away, an action of trespass lies against him. Hob. 42. Cooper v. Andrews.

A *modus* is not destroyed by the payment of tythe in kind for some years. 2 Bulstr. 240. Price v. Maschal.

On the other hand a *modus* must be paid every year, although no tythe would have been due: for the *modus*, it being a recompence for the tythe, becomes a spiritual fee. Hob. 42. 44.

If the land, for which there is a *modus*, lie fresh, the *modus* must nevertheless be paid. Hardr. 184. Holbeach v. Whadcock.

If there be a *modus* to pay thirty eggs, in lieu of the tythe of all eggs, the thirty eggs must at all events be paid. 1 Roll. Abr. 648. pl. 3. Salk. 657.

Ld. Raym. 360.

## 2. Of the Certainty required in a *Modus*.

A *modus* must be certain as to the sum of money, or other thing, which is to be paid.

A *modus*, to pay two shillings in the pound of the yearly rent of the land, is void; because as the yearly rent may be raised or fallen at pleasure, the sum of money to be paid must always be uncertain. 12 Mod. 563. Salk. 657. Ld. Raym. 697. Bunb. 20. 174.

A *modus*, to pay one penny or thereabouts for every acre of land, is void; by reason of the uncertainty of the sum of money to be paid. 2 Roll. Abr. 265. D. pl. 2. 2 P. Wms. 572.

[A *modus* to pay a fother of hay in lieu of tythes, is void, for uncertainty. Ambl. 365. Fenwicke v. Lambe and others.

A *modus* of a penny in lieu of tythe of hay of the lands occupied with each house in the parish, is bad.] Travis v. Oxtou, Antir. 309, n.

Bunb. 279.  
Wolverston  
v. Manwar-  
ing.

But it has been holden, that a *modus*, to deliver nine cart loads of logwood in lieu of all tythes, is certain enough.

The thing for which a *modus* is to be paid, must likewise be certain.

2 P. Wms.  
462.  
Carlton v.  
Brightwell.

The defendant in a suit for tythe insisted, that the inhabitants of a certain tenement had been accustomed to pay a sum of money as a *modus*, for the tythe of all corn, grown upon the lands *usually enjoyed therewith*. The *modus* was holden to be void for uncertainty; because the words *usually enjoyed therewith* imply, that the same lands had not been constantly enjoyed with the tenement.

Bennet v.  
Read, Anstr.  
322, n.

[A *modus* of two-pence payable by every householder or inhabitant in the parish for all tythe of fuel, of fruits, of agistment, and of wood, is good.]

Bunb. 129.  
Burwell v.  
Coates.

It has been holden, that a *modus* for a farm is void; because a farm does not consist of any certain quantity of land.

Bunb. 160.  
Finch v.  
Malters.

But, if in prescribing for a *modus* for a farm, the quantity of land of which the farm consists be specified, the *modus* is good.

[See Scott v. Allgood, Anstr. 16.]

And it is not necessary, that the thing, for which a *modus* is to be paid, should be always described with certainty in prescribing for the *modus*; because, if from what is alleged the thing can fairly be ascertained, the *modus* is good; it being a maxim of law, that *certum est quod certum reddi potest*.

2 P. Wms.  
572.

A *modus*, to pay twelve pence for every acre of upland, was holden to be good; because what is upland may be ascertained.

2 P. Wms.  
572.  
Chapman v.  
Monson.

The prescription was, that every person living out of a parish should pay four pence for every acre of meadow or pasture occupied by him in the parish. This was decreed to be a good *modus*; Lord King, Chancellour, and Reynolds and Fortescue, the two justices who assisted him, being of opinion, that it was certain enough; for that there is no great difficulty in ascertaining the number of acres of meadow or pasture occupied by a person in a parish.

1 Roll. Abr.  
651. pl. 3.

A *modus* for a park is good, although the quantity of land of which it consists be not mentioned; for a park is sufficiently ascertained by its boundaries.

1 Roll. Abr.  
651. pl. 4.

But, if a park be disparked, the *modus*, unless the occupier of the disparked land allege, that it is to be paid for a certain quantity of land, is void.

Anstr. 16.

[A *modus* for every ancient orchard is good.]

8 Mod. 375.  
Bunb. 105.  
171. 173.

The time of paying what is to be paid as a *modus*, must likewise be certain.

Bunb. 158.  
Blacket v.  
Finn.

If the *modus* be to pay a sum of money yearly, in lieu of tythe, on or about the first day of May; this is not a good *modus*, because the time of payment is uncertain.

Punb. 173.  
Phillips v.  
Simes.

The prescription was, to pay a sum of money, as a *modus* for the tythe of sheep, at *Easter*, or when the sheep shall be sold. The *modus* was holden to be void, by reason of the uncertainty of the time of payment.

3. Of a *Modus*, which amounts to a Prescription in *Non decimando*.

A *modus*, to pay the tythe of part of a thing, which is tythable of common right, in discharge of the tythe of the whole thing, is void. Cro. Ja. 47.  
Webb v.  
Warner.  
Ld. Raym. 677.

If the *modus* be, to pay the tythe of hay grown upon some lands, in discharge of the tythe of hay grown upon all other lands in the parish, the *modus* is bad; for, as it is only a recompence as to part, it amounts to a prescription *in non decimando* as to the residue of the hay grown in the parish.

A *modus* to pay the tythe of milk part of the year, in discharge of the tythe of milk for the whole year, was holden to be void; because it is, in effect, a prescription *in non decimando* as to milk for part of the year. Ld. Raym.  
360. Hill v.  
Vaux. Cro.  
Eliz. 609.  
Saik. 656. 12 Mod. 206. Bunb. 307.

But, if the tythe of a thing, as of wood, be only due by custom, a *modus* to pay the tythe of part thereof, in discharge of the tythe of the whole, is good; because there may be a prescription *in non decimando*, as to part of such a thing. Saik. 656.  
Ld. Raym.  
137.  
12 Mod.  
111.

If the tythe of part of a thing, which is tythable of common right, be by a *modus* made more valuable, the *modus*, although it is to be paid in discharge of the tythe of the whole thing, is good; because such *modus* may be a recompence for the tythe of the whole thing. Hob. 250.  
Saik. 656.  
12 Mod.  
206. Ld.  
Raym. 360.  
2 P. Wms. 521.

A *modus*, to pay the tenth cheese from the first day of *May* until the first day of *August*, in discharge of the tythe of milk for the whole year, is good: because, by the labour of making it into cheese, the tythe of milk is made more valuable so long as it is paid. Cro. Eliz.  
609.  
Austin v.  
Lucas.

A *modus*, to pay a quantity of a thing, which is tythable of common right, in discharge of the tythe of the whole thereof, which a man may happen to have, is a good *modus*.

A *modus*, to pay thirty eggs of the produce of a man's own hens, in discharge of all tythe of eggs, would be void: for, as thirty eggs may not be the tythe of all the eggs a man has, such a *modus* may amount to a prescription *in non decimando* as to some eggs. Ld. Raym.  
360.  
Hill v.  
Vaux.

But a *modus* to pay thirty eggs, in discharge of the tythe of all the eggs a man may happen to have, is good: for these eggs, which are not to be considered as tythe, must be paid at all events; whether the person, who is to pay them, have hens or not. 1 Roll. Abr.  
648. pl. 3.  
Ld. Raym.  
360.

A *modus* for the tythe of one thing, which is tythable of common right, can never be a discharge of the tythe of another thing, which is likewise tythable of common right.

The *modus* was, to pay one penny for every mare; and it was alleged, that this was to be a satisfaction for the tythe of horses, mares, and colts. This *modus* was holden to be void; because a *modus* for one thing, which is tythable of common right, it being in fact only a recompence for the tythe of that thing, can never be a recompence for the tythe of another thing which is likewise tythable of common right; and, consequently, such *modus*, Cro. Eliz.  
445.  
Gryfman v.  
Lewes.

*modus*, which amounts to a prescription *in non decimando* as to the other thing, is void.

#### 4. Of a *Modus*, which has not been constantly paid.

**Salk. 656.** It is laid down, that if a *modus* have not been constantly paid, it is destroyed.  
**The Archbishop of York v. The Duke of Newcastle.**

**1 Roll. Abr. 651. Sharp v. Coult.** And it has been holden in one case, that if a *modus* be for the tythe of hay, grown upon a certain piece of land, and the land be converted into arable land, the *modus* is destroyed.

But it is in other cases laid down, that, although the payment of a *modus* be suspended or cease for a time, it may be revived again.

**Godb. 194. Brown's case.** In one case the contrary to what was holden in the case of *Sharp and Coult* is laid down expressly: for it is laid down, that if there be a *modus* for the tythe of hay, grown upon a certain piece of land, the *modus* is only suspended by converting the land into arable land, and revives again whenever hay is grown thereupon.

**1 Roll. Rep. 121. Hooper v. Andrews.** In another it is laid down, that if an orchard, for which there is a *modus*, be disorcharded, the *modus* is suspended: but that, whenever the same ground is again converted into an orchard, the *modus* is revived.

**2 Bullst. 240. Price v. Mafcal.** In another it is laid down, that a *modus* is not destroyed by the payment of tythes in kind for some years.

**2 P. Wms. 572. Chapman v. Monson, Hil. 3 G. 2.** And the doctrine of these three cases is adhered to, and confirmed in a modern case.

#### 5. Of a leaping *Modus*.

**1 Eq. Ca. Abr. 369.** It is not, as has been already observed, necessary, that a *modus* should have been constantly paid, yet a *modus* must, when paid, have been constantly paid in the same manner; otherwise it is called a leaping *modus*, and is therefore void.

**Select Ca. in Chan. 52. Webber v. Taylor.** The *modus* was, to pay a certain sum of money for the tythe of certain premises, whilst they continue in certain hands: but, if the premises should come into other hands, then the said sum or tythes in kind were to be paid at the election of the parson. This *modus* was holden to be bad. And by the court—There cannot be a leaping *modus*.

#### 6. Of a *Modus*, which is too rank.

Wherever the sum of money, or other thing paid as a *modus*, is of greater value than it can be fairly supposed the tythes for which it is paid were at the time of its commencement worth, such *modus*, which is called a too rank *modus*, is void.

**11 Mod. 60. Startup v. Dodderidge, Pasch. 4 Ann.** A prohibition was refused, because the *modus* appeared to be too rank. And by *Holt*, Chief Justice—Wherever a *modus* runs too high, the presumption is strong, that it is not a *modus*.

In a case about two years after, the contrary was laid down.

The *modus* appearing too rank, it was decreed by the court of Exchequer to be a temporary composition, and not a *modus* : but the decree was reversed ; for churches may have been endowed with more than the value of the tythes.

Vin. Abr.  
tit. Dismes,  
D. a. pl. 47.  
Pole v.  
Gardiner, Mar. 5, 1707.

But it has been since holden in divers cases, that a *modus*, which is too rank, is void.

In one case, a *modus* of five shillings for every acre of wheat was holden to be void, as being too rank ; because five shillings is very near, if not quite the value, of the tythe of an acre of wheat at this day.

Bunb. 10.  
Benson v.  
Watkins.  
Hil. 3 G. 1.

In another, a *modus* of one shilling for a milch cow was holden to be void, because it is too rank. And by the court—A shilling was, at the time this *modus* must be supposed to have had its commencement, half the yearly value of the milk of a cow.

Bunb. 78,  
79. Bennet  
v. Jenkins,  
Trin. 7 G. 1.

And in the same case a *modus* of sixpence for a calf was holden to be too rank,

The reporter of this case does indeed say, in a note, that since this case a *modus* of sixpence for a calf has been holden to be good.

And in another case, not two years before that of *Bennet v. Jenkins*, a *modus* of eleven pence for a milch cow, and one of sixpence for a calf were both holden to be good.

Bunb. 57.  
Roe v. The  
Bishop of  
Exeter, Hil. 6 G. 1.

It may, upon comparing the two last cases, be doubtful, whether a shilling be too rank a *modus* for a milch cow and sixpence for a calf : but they both confirm the doctrine, that a *modus* which is too rank, is void ; for the two questions, Whether a particular *modus* be too rank, and whether a *modus* which is too rank be void, are quite distinct and independent of each other.

[A *modus*, of 5*s.* an acre for all land sown with wheat, in lieu of all tythes of wheat, is too rank. So, of 2*s.* 6*d.* an acre for all land sown with other grain, in lieu of all tythe of such grain. So, of 2*s.* an acre for all meadow mowed, and 1*s.* 4*d.* for upland grass-ground mowed, in lieu of all tythes of grass and pasture. So, of 2*s.* 6*d.* for every farrow of pigs littered, in lieu of all tythes of them. So, of 8*s.* a score of lambs, in lieu of the tythe of lambs. So, of 1*d.* a fleece of all wool shorn in the parish, in lieu of all tythe wool.]

Torriano v.  
Legge,  
1 Bl. Rep.  
420.  
2 Rayn.  
559.

## 7. Of a *Modus*, which is liable to Fraud.

A *modus* of one penny, for the tythe of all hay arising upon a farm, being prescribed for, it was objected, that the *modus* is liable to fraud ; for that all the land may be turned into meadow, and then only one penny will be paid for the tythes of the whole farm : but the *modus* was holden to be good.

Bunb. 162.  
Finch v.  
Masters.

The *modus* was, that every person, who lived out of a parish, should pay four pence, for every acre of meadow or pasture occupied by him in the parish. It was objected, that such a *modus* is liable to great fraud ; for that many persons would live out of the parish,

2 P. Wms.  
569-571,  
572.  
Chapman v.  
Mason.

parish, to avoid paying tythes in kind; and others would, by threatening to leave the parish if he did not do it, compel the parson to take less than the worth of his tythes. It was answered, that, if the being liable to fraud is an objection to the goodness of a *modus*, scarce any *modus* will be good; because every one is in some degree liable to fraud. The *modus* was holden to be good.

### 8. Of a *Modus* for such Persons as live out of the Parish.

1 Lev. 116.  
Bawdry v.  
Busbell.

It has been holden, that a *modus*, for such persons as live out of the parish, is unreasonable; for that the inhabitants of the parish, as being liable to the charge of the repairs and vestments of the church, ought to be most favoured in the payment of tythes.

2 P. Wms.  
567. 574.  
Chapman v.  
Monson.

But in a modern case such a *modus* was holden to be good; and the opinion of the court, in the case of *Bawdry v. Busbell*, is not only said to have been a hasty one; but the ground of it, namely, that only parishioners are liable to the charges of repairs and vestments of the church, is expressly denied to be law.

### 9. Of the Extent of a *Modus*.

Bunb. 79.  
Perrot v.  
Markworth.

A *modus* for a garden extends only to the ancient ground of the garden; for, if more ground be laid to the garden, the *modus* does not extend thereto.

Lutw. 1074.  
Bunb. 79.  
34+

If a *modus* be, to pay at the rate of a certain sum by the acre for the tythe of all hay grown in the parish, the *modus* extends to clover, sainfoin, and all other things of the grass kind, although the cultivation of some of these has been lately introduced into the parish.

Fitzgib. 53.  
Fox v. Aide.

But, if a *modus* be for the tythe of all hay grown in the parish, or for the tythe of all hay grown upon a particular farm in the parish, the *modus* extends only to the ancient meadow of the parish or farm.

1 Roll. Abr.  
651. Ruffel  
v. More,  
Trin.  
39 Eliz.

It has been holden, that if a mill be erected upon a piece of land, for which there is a *modus*, the *modus* extends to the mill.

Cro Ja.  
429. Anon.  
Trin.

But this case does not seem to be law; for in a later case it was holden, that a mill, although it be erected upon land discharged of tythes, is liable to the payment of tythe.

15 Ja. 1.  
4 Med. 45.  
Grimley v.  
Falkingham.

If there be a *modus* for a mill, in which there has always been but one pair of stones, and a second pair of stones be added to the mill, the *modus* extends to these.

1 Roll. Abr.  
641. pl. 1.

If the stream of a mill, for which there is a *modus*, be by the act of God changed from its usual course, and afterwards the owner pull that mill down, and erect a new mill upon the new stream, the *modus* extends to the new mill.

*Id.*

But, if the stream had been changed by the act of the owner, the new mill would have been liable to the payment of tythe.

(S) Of a Prescription in *Non decimando*.

A Spiritual person may prescribe *in non decimando*; because every such person was, at the common law, capable of receiving a grant of tythes. 1 Roll. Abr. 653. Cro. Eliz. 206. 216. 511. Cro. Car. 423.

Another and the principal reason is, that the church does not lose any thing by such prescription; a spiritual person having the benefit thereof.

The churchwardens of a parish, although they hold land for repairing the church, cannot prescribe *in non decimando* for the land: because they are not spiritual persons. 1 Roll. Abr. 653. pl. 6.

If a layman be tenant for years to a spiritual person of land which is discharged of tythes, he may prescribe *in non decimando* for the land; because, as the possession of the tenant is in point of law the possession of the landlord, the prescription in this case would be in the right of a spiritual person. 1 Roll. Abr. 653. pl. 4. Cro. Eliz. 216. 512. 785. Moor, 219.

But, if a spiritual person grant an estate of inheritance in land, for which the spiritual person might himself have prescribed *in non decimando*, to a layman, the grantee cannot prescribe *in non decimando*; because the prescription would be in his own right. Cro. Car. 423. Hardr. 315. 2 Keb. 27. 1 Sid. 320.

It has, however, been holden, that a layman, who holds land by copy of court-roll of a manor discharged of tythes, may prescribe *in non decimando* for the land; although he has an estate of inheritance therein. Cro. Eliz. 784. Crouch v. Fryer. Yelv. 2.

A layman may prescribe *in modo decimandi*, but he cannot prescribe *in non decimando*, for any thing which is tythable of common right; because a layman was not, at the common law, capable of receiving a grant of tythes; and it has been holden in favour of the church, that the right of tythes cannot be taken away, unless an actual recompence be paid for the same; or unless the instrument, by which the land has been thereof discharged, be produced. 11 Rep. 13. 1 Roll. Abr. 653. Cro. Eliz. 293. 512. 599. 763. Hob. 296. 2 P. Wms. 573.

It has been holden in two modern cases, that a layman can no more prescribe *in non decimando* against an impropiator than against a rector; for that both are equally entitled of common right to tythes. Bunb. 325. Charlton v. Charlton. Ibid. 345. The Corporation of Bury v. Evans.

It is said to have been holden in one case, that the inhabitants of two hundreds may prescribe *in non decimando*, for a thing which is tythable of common right. 1 Roll. Abr. 654. Kidder v. Edwards, Pasch. 15 Car. 1.

But in a subsequent case it is laid down, that neither the inhabitants of two hundreds, nor of a whole county, can prescribe *in non decimando*, for a thing, which is tythable of common right: and it is added, that as no single inhabitant of a hundred or county can in such case prescribe *in non decimando*, it would be absurd to hold, that all the inhabitants of a hundred or county may. Ld. Raym. 137. Hicks v. Woodton, Hil. 8 W. 3. 12 Mod. 112. Salk. 655.

It is indeed true, that a prescription *in non decimando* for wood by the inhabitants of a hundred, has been holden good: but no inference Ld. Raym. 127. 12 Mod. 114.

Salk. 656. inference can be drawn from hence; because tythe of wood,  
Comb. 404. which does not renew annually, is not due of common right,  
for in ancient times it was only paid in particular places by  
custom.

### (T) Of a Discharge of Tythes by Grant.

1 Rep. 45. **A** Layman was not, at the common law, capable of receiving a  
11 Rep. 13. grant of tythes.  
Cro. Eliz.  
293. 599. 763. Hob. 296.

2 Rep. 44. But the land of a layman could, at the common law, have been  
Bishop of discharged of tythes by grant, provided the parson, patron, and  
Winches- ordinary were all parties thereto.  
ter's case.

2 P. Wms. And a discharge of tythes by such grant, in case it were ob-  
573. tained before the restrictive statutes, is at this day good.  
Chapman v. Monson. Cro. Car. 423.

2 P. Wms. A layman cannot avail himself of a discharge of tythes by  
573. grant, unless he produce the deed of grant: for if this be not  
Chapman v. produced, tythes must be paid, although none have been paid  
Monson. within time of memory; because a layman cannot prescribe *in non*  
11 Rep. 13. *decimando*.  
1 Roll. Abr. 653.  
Cro. Eliz. 293. 512. 599. 763. Hob. 296.

### (U) Of a Discharge of Tythes by Bull.

2 Inst. 652, **S**PIRITUAL persons heretofore frequently purchased bulls  
653. from the pope, for discharging their lands of the payment  
of tythes.

Cro. Ja. The practice of doing this seems to have been more prevalent  
454. after the ordinance of Pope *Pascal* the Second, by which it was  
2 Rep. 44. ordained, that only the lands of the *Cistercians*, *Hospitallers*, and  
*Templars* should be exempted from the payment of tythes.

2 Inst. 653. It was the opinion of *Coke*, Chief Justice, that the pope never  
had the power of discharging any land, belonging to a subject of  
this realm, of the payment of tythes.

For the sake of removing all doubt as to this, and of putting a  
stop to the practice of purchasing bulls for discharging land of the  
payment of tythes, it is by the 7 H. 4. c. 6. after reciting, that the  
order of the *Cistercians* in this realm had purchased certain bulls,  
to be discharged of the tythes of their lands let to farm, enacted,  
“ That the religious of the order of *Cistercians* shall be in the  
“ state they were in before such bulls were purchased; and that  
“ if they of the said order or any other, religious or seculars, of  
“ whatsoever state or condition they be, do put the said bulls in  
“ execution, or do from henceforth purchase other such bulls; or  
“ by colour of the same bulls, purchased or to be purchased, do  
“ take advantage in any manner; a writ of *præmunire facias* shall  
“ go against them.”



## (W) Of a Discharge of the Payment of Tythes by Order.

**I**N antient times, monks of all orders were discharged of the payment of tythes.

But as monks in process of time increased to a great degree, and had such large possessions, that holy church was thereby greatly impoverished, *et filia devoravit matrem*, Pope *Pascal* the Second ordained, that monks orders, except the *Cistercians*, *Templars*, and *Hospitallers*, or of *St. John of Jerusalem*, should be liable to the payment of tythes.

This ordinance being found insufficient to prevent the impoverishment of the church, another was some time after made by Pope *Adrian* the Fourth; by which even the lands of those three orders, except the lands *quæ propriis manibus excoluntur*, were rendered liable to the payment of tythes.

The privilege of being discharged of tythes extended only to such lands as those three orders were possessed of about the year 1200; for all parochial tythes being at that time appropriated to the persons who had the cure of souls in the respective parishes, it followed, that if land in a parish were afterwards granted to either of these orders, it would be liable to the payment of tythes.

As a discharge of tythes by order was personal, every such discharge must, upon the dissolution of the religious houses to whose persons it was annexed, have been at an end, if it had not been continued by one or more statutes.

By the 31 H. 8. c. 13. § 21. it is enacted, "That the king, his heirs and successors, and every person, his heirs and assigns, which hath or hereafter shall have any manors, lands, tenements, or other hereditaments whatsoever, which belonged or now belong unto any monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other religious and ecclesiastical houses or places, shall have, hold, and enjoy the said manors, lands, tenements, and other hereditaments whatsoever, and every of them, discharged and acquitted of the payment of tythes, as freely, and in as ample a manner, as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses, or any of them, had, held, occupied, possessed, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming to the king's highness, of such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other religious or ecclesiastical houses or places, or any of them."

By this statute the privilege of being discharged of tythes, which the monks of the order of *Cistercians*, *Templars*, *Hospitallers*, or of *St. John of Jerusalem*, had enjoyed for all the lands *quandiu propriis manibus excoluntur*, which they were possessed of before the

Cro. Ja.

454.

2 Rep. 44.

Cro. Ja. 57.

2 Inst. 652.

2 Rep. 44.

Cro. Ja. 454.

2 Inst. 652.

Cro. Ja. 57.

Cro. Ja.

608.

Gerrard 72

Wright.

Cro. Ja. 57.

108.

Cro. Car. 74.

Hob. 306.

appropriation of parochial tythes, was continued to such of these lands as were thereby vested in the crown.

Bunb. 138.  
Lambert v.  
Cumming.

It has been holden, that if land, heretofore discharged by order of tythes, be at this day discharged of tythes, a right of common, either appendant or appurtenant to the land, is likewise discharged thereof.

Bunb. 122.  
Lord v.  
Turk.

Evidence of a great tythe having been paid for land, whilst it was in the hands of the monks of an order capable of a discharge of the payment of tythes, is the best evidence, which can at this day be given, that the monks were not possessed of the land before the appropriation of parochial tythes.

Clayt. 53.  
Pl. 92.

But evidence of the payment of a small tythe for land, whilst it was in the hands of the monks of an order capable of a discharge of the payment of tythe is not evidence of this; because lands discharged by order were only discharged of the payment of great tythes.

Hardr. 174.  
190. Wilfon  
v. Redman.  
Clayt. 53.

A tenant for life of land which was discharged by order of the payment of tythes at the time of the dissolution of the religious house to which it belonged, is not at this day discharged of the payment of tythes; for the construction of the 31 H. 8. c. 13. has always been, that the privilege of being thereby discharged of the payment of tythes, is only continued to those who have an estate of inheritance in the land.

Cro. Ja. 559.  
Porter v.  
Bathurst.  
Cro. Ja. 454.  
Hardr. 190.

It was found by a special verdict, that the lands in question heretofore belonging to an abbey of the *Cistercian* order, were discharged of the payment of tythes *quamdiu propriis manibus excoluntur*; that these lands were in lease for years, at the time of their being vested in the crown by the 31 H. 8. c. 13. and that the lease was now expired: and the question was, Whether the grantee in fee of the crown, should be discharged of the payment of tythes *quamdiu propriis manibus excoluntur*? It was holden, that he should: and by the court—Although the tenant for years paid tythes for the lands at the time of the dissolution of the abbey; yet as the abbot would have holden them, in case the lease thereof had expired before the dissolution, discharged of the payment of tythes *quamdiu propriis manibus excoluntur*, the grantee of the crown ought to hold them in the same manner.

By the 27 H. 8. c. 28. § 1. all religious and ecclesiastical houses, whose possessions were not of the value of more than two hundred pounds a year, were to be dissolved; and the lands, tenements, tythes, and other hereditaments of such religious and ecclesiastical houses were to be vested in the crown.

And by §. 2. it is enacted, "That every person, who now hath, or hereafter shall have, any letters patent of the king's highness of the lands, tenements, tythes, or other hereditaments which appertained to any religious house heretofore dissolved, or which appertaineth to any religious house that shall be suppressed or dissolved by the authority of this act, shall have and enjoy the said lands, tenements, tythes, and other hereditaments, specified in their letters patent, in like manner, form and condition, as the abbots, priors, abbesses, prioresses, and other  
" chief

chief governors, had or ought to have the same if they had not been suppressed or dissolved."

It has been frequently determined, that no land, heretofore discharged by order of the payment of tythes *quamdiu propriis manibus excoluntur*, which in pursuance of this statute was vested in the crown, is discharged of the payment of tythes.

Hob. 306.  
Cro. Ja.  
57. 608.  
Cro. Car.  
24.

There is in the 31 H. 8. c. 13. a clause in the third paragraph to the same effect, concerning the lands of religious houses thereby vested in the crown: but it is plain, from a subsequent clause in the twenty-first paragraph of the 31 H. 8. c. 13. by which such lands are discharged of the payment of tythes, that the legislature were sensible, that such lands were not discharged thereof by the former clause; for if they had been thereby discharged, the inserting of another clause of discharge would have been altogether nugatory.

By the twenty-first paragraph of the 31 H. 8. c. 13. only such lands, heretofore discharged by order of the payment of tythes *quamdiu propriis manibus excoluntur*, are discharged of the payment of tythes, as came to the hands of Henry the Eighth after the fourth day of February in the twenty-seventh year of his reign.

In consequence of this it has been holden, that no lands, heretofore discharged by order of the payment of tythes *quamdiu propriis manibus excoluntur*, which were vested in the crown in pursuance of the 27 H. 8. c. 28. were discharged of the payment of tythes by the 31 H. 8. c. 13. for, as the lands vested in the crown by the former of these statutes, were by relation vested upon the fourth day of February in the twenty-seventh year of the reign of King Henry the Eighth, that being the first day of the session of parliament in which the 27 H. 8. c. 28. was made, the latter statute cannot extend to those lands.

Hob. 306.  
Cro. Ja. 57.  
608. Cro.  
Car. 24.

It has been holden in two cases, that lands, heretofore discharged by order of the payment of tythes *quamdiu propriis manibus excoluntur*, which were vested in the crown by the 32 H. 8. c. 24. are not at this day discharged of the payment of tythes.

38 Eliz. Cro. Ja. 58. Cornwallis v. Scolding, Hil. 44 Eliz.

As there is no discharging clause in this statute, such lands must, if they are discharged of the payment of tythes, be discharged by the 31 H. 8. c. 13.

2 Rep. 46.  
The Arch-  
bish p of  
Canterbury's  
case, Trin.  
Cro. Car. 24.

It appears, indeed, upon comparing the discharging-clause in the twenty-first paragraph of the 31 H. 8. c. 13. with the third paragraph of the same statute, that the discharge extends to the lands of religious houses, "which thereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the king's highness." But the construction in one of the cases was, that the words, *or by any other means come to the king's highness*, do not include a coming by act of parliament; for if the legislature had intended to include a coming to the king by act of parliament, this, which is the highest way of coming, would have been mentioned before the coming by dissolution, or by the other inferior ways which are therein

2 Rep. 46.  
in Arch-  
bishop of  
Canterbury's case.

therein particularly mentioned. And in support of this construction a case was relied on, in which it had been holden, that bishops are not included under these words of the 13 *Eliz. c. 10.* "Colleges, deans and chapters, parsons, vicars, and others having ecclesiastical livings." because as persons of an inferior rank are expressly mentioned, bishops, if it had been intended to include them, would have been likewise expressly mentioned.

2 Jon. 187. But it has been holden in a subsequent case, by three judges  
Whitton v. against one, that lands, heretofore discharged by order of the  
Weston, payment of tythes *quamdiu propriis manibus excoluntur*, which were  
Trin. vested in the crown by the 32 *H. 8. c. 24.* are at this day dis-  
4 Car. 1. charged of the payment of tythes; for that the words in the third  
paragraph of the 31 *H. 8. c. 13.* *which thereafter shall happen to be*  
*dissolved*, include every kind of dissolution, and consequently a  
dissolution by act of parliament; and that the words, *or by any*  
*other means come to the king's highness*, include as well a coming by  
act of parliament as a coming by any other way.

Freem. 299. And in a still later case it is said, that, although there may have  
Star v. Eli- been formerly a difference of opinion as to this point, it is now  
ot. Mich. settled, that the discharging-clause of the 31 *H. 8. c. 13.* extends  
31 Car. 2. to lands vested in the crown by the 32 *H. 8. c. 24.*

### (X) Of a Discharge of the Payment of Tythes by Unity of Possession.

2 Rep. 47, SO long as land in a parish was in the possession of an abbot,  
48. The who was also possessed of the rectory of the parish, the payment  
Archbishop of Canterbury's case. of tythes for the land was necessarily suspended; because the abbot  
could not pay tythes to himself.

11 Rep. 14. But the land was not discharged of tythes by the unity of pos-  
Pridde v. session; because tythes do not issue out of land but are collateral  
Napper. thereto.  
2 Rep. 47.  
49. Cro. Ja. 454. Com. 503.

Com. 511. And consequently so soon as the possession of the land was  
Fox v. severed from that of the rectory, the land became again liable  
Bardwell, to the payment of tythes.  
2 Rep. 47.  
49. Cro. Ja. 454. 11 Rep. 14.

2 Rep. 47. Nay it has been holden, that, although there had been, pre-  
The Arch- viously to the dissolution of the religious house, a perpetual unity of  
bishop of possession of the land and the rectory in the abbot and his prede-  
Canterbury's cessors, this is not an absolute discharge of the tythes of the land;  
case. inasmuch as the words of the discharging-clause in the 31 *H. 8.*  
Hob. 298. *c. 3.* are not *discharged of tythes*, but *discharged of the payment of*  
*tythes*.

11 Rep. 13, Great doubt was formerly entertained, whether a perpetual unity  
14. Pridde of possession of land and the rectory of the same parish is *primâ*  
v. Napper. *facie* a discharge of the tythes of the land, within the meaning of  
2 Rep. 48. the discharging-clause in the 31 *H. 8. c. 13.*  
Hob. 298.  
311.  
Cro. Eliz. 578.

But it was at length determined, that if the land and the rectory had been in the possession of the abbot and his predecessors for time immemorial, and was so at the dissolution of the monastery, and it do not appear that tythes had ever been paid for the same, such land is *prima facie* discharged of tythes by the 31 H. 8. c. 13. The reason given for this determination is, that, as it would be very difficult if not impossible to shew at so great a distance of time, in what manner the land was at first discharged of tythes, it shall be intended, that it was discharged by grant; in which case the discharge runs with the land.

If it appear, however, that a farmer of the land had at any time before the dissolution of the monastery paid tythes for the same, this destroys the presumption arising from the perpetual unity of possession; and is evidence, that, although the payment of tythes was suspended by reason of the unity of possession, the land was not discharged thereof by grant.

2 Rep. 48.  
The Archbishop of Canterbury's case.  
11 Rep. 13.  
14.  
Hob. 298.  
311.  
Cro. Eliz.  
578.

Hob. 298.  
Slade v. Drake.  
2 Rep. 48.  
11 Rep. 14.  
Hob. 311.  
Cro. Ja.  
Comb. 511.

It has already been observed, that lands, heretofore discharged by order of the payment of tythes *quandiu propriis manibus excoluntur*, which were vested in the crown by the 27 H. 8. c. 28. are not discharged of the payment of tythes by the 31 H. 8. c. 13.

Ante, 755.

It is sufficient in this place to say, that land which was vested in the crown by the former of these statutes, is not by the latter absolutely discharged of the payment of tythes; notwithstanding there had been a perpetual unity of possession of the land and the rectory of the same parish in the abbot and his predecessors.

It has been determined in two cases, that land, which was vested in the crown by the 32 H. 8. c. 24. is not discharged of tythes by the 31 H. 8. c. 13. although there had been, before the dissolution of the monastery to which the land belonged, a perpetual unity of possession of the land and the rectory of the same parish in the abbot and his predecessors; and it do not appear that any tythes have ever been paid for the same.

2 Rep. 46.  
Cro. Ja. 58.

As the reasons upon which these determinations were founded have been already mentioned, it is not necessary to repeat them.

But, as has already been observed, the determinations in two subsequent cases have been, that the discharging-clause of the 31 H. 8. c. 31. does extend to lands, which were vested in the crown by the 32 H. 8. c. 24.

It has been holden, that, although there had been a perpetual unity of possession of land and the rectory of the same parish in a dean and chapter, and their predecessors, or in any other corporation which was not religious as well as ecclesiastical, and it do not appear that any tythes have ever been paid for the land, it is not absolutely discharged of tythes by the 31 H. 8. c. 13. for that, whenever the houses dissolved, or to be dissolved, are mentioned in that statute, they are always called *religious and ecclesiastical houses*. The discharging-clause in the twenty-first paragraph of that statute does indeed say, that the lands of the houses dissolved, and to be dissolved, shall be holden and enjoyed "discharged of the payment of tythes, as freely and in as ample a

2 Rep. 48.  
49. The Archbishop of Canterbury's case.  
Cro. Eliz.  
511.

“ manner as the late abbots, priors, abbeſſes, and other eccle-  
 “ ſiaſtical governors and governeſſes, or any of them, had, held,  
 “ occupied, poſſeſſed, or enjoyed the ſame, or any parcel thereof :”  
 but the contruſtion has been, that as no houſes, except ſuch as  
 were religious as well as eccleſiaſtical, had been diſſolved, theſe  
 words, *eccleſiaſtical governors*, only mean governors of houſes  
 which were religious as well as eccleſiaſtical.

Brewer v.  
 Hill, Anſtr.  
 424.

[A leaſe of tythes for ſo long time as the leſſor ſhall continue  
 vicar of *A.* is good; and conveys a freehold. But an agreement  
 to accept a reaſonable compoſition for tythes, not exceeding 3*s.* 6*d.*  
*per acre*, is not a leaſe of the tythes, for the uncertainty of the  
 render.]

## (Y) Of Agreements and Leaſes concerning Tythes.

Bro. *contr.*  
 pl. 13.  
 Yelv. 94.  
 1 Brownl.  
 98.  
 Palm. 377.  
 Godb. 354.

It ſeems to be ſettled, that if a parol agreement be made for  
 tythes, by way of ſale thereof for a term of years, or for the  
 life of the parſon, in caſe he ſo long continue to be parſon, the  
 agreement is binding.

8 Mod. 62.

[See Vol. iv.  
 p. 53-4.]  
 Yelv. 95.  
 Noy, 121.  
 2 Brownl. 11.  
 3 Leon. 247.

But the law does not ſeem to be ſettled, as to the validity of a  
 parol agreement for tythes, by way of retainer thereof.

It is laid down in ſome books, that a parol agreement for  
 tythes, by way of retainer thereof, for a term of years is good.

Hetl. 128.

Cro. Ja. 669.  
 Honevcomb  
 v. Sweet.  
 1 Lev. 24.

In other books it is laid down, that if a parol agreement be  
 made for the retaining of tythes during the life of the parſon, in  
 caſe he ſo long continue to be parſon, the agreement is good.

But it ſeems to be the better opinion, that ſuch an agreement,  
 either for years, or during the life of the parſon, in caſe he ſo  
 long continue to be parſon, is not good.

Nov. 28.  
 2 Brownl. 92.  
 Owen, 103.  
 1 Roll. Rep.  
 174. Godb. 354. Cro. Eliz. 249. Cro. Ja. 137. 360. Hard. 203.

It is in divers books laid down, that ſuch an agreement is not  
 good for more than one year; becauſe it is in the nature of a leaſe  
 of tythes, which is not good unleſs it be by deed.

Cro. Ja. 137.  
 Hawkes v.  
 Brayfield.  
 Bugo. 2.  
 Kedington  
 v. Bridgman,  
 Hil. 2. 1.  
 Har. r. 2. 3.  
 Brammer v.  
 Thornton.

And in one of theſe it is ſaid expreſſly, that ſuch an agree-  
 ment is only good, even for one year, becauſe it is *quafi* a ſale of  
 the tythes.

And in a modern caſe, two out of three of the barons of the  
 Exchequer were of opinion, that a parol agreement, by way of  
 retainer of tythes, can only be good for one year.

If a parſon, who has made a parol agreement, by way of re-  
 tainer of tythes, for a term of years, or for the term of his life,  
 in caſe he ſo long continue to be parſon, afterwards bring an ac-  
 tion upon the ſtatute for ſubtraction of tythes, without having  
 firſt given notice of his diſſent to the agreement, the pariſhioner,  
 although the agreement be not binding, ſhall not be liable to the  
 penalties of the ſtatute, nor to coſts.

And

And notice of his dissent is not good, unless it be given before the land, of which he means to take tythes in kind, is manured and sown: because perhaps the land would not, if an earlier notice had been given, have been manured and sown.

tion of tythes has not yet been decided. It has been said, that the notice is analogous to that between landlord and tenant. *Bishop v. Clitheller*, 2 Br. Ch. Rep. 161. Notice is necessary, though the parishioner insist on a modus. *Id. ibid.*

If a parol agreement, by way of retainer of tythes, be made by a parson, and he refuse to abide thereby, the parishioner, although the agreement be not binding as to the tythes, may maintain an action against the parson for non-performance of the agreement.

But, if a parol agreement for years be made with *A.* that he and his assigns shall retain the tythes of certain land, and the land be afterwards assigned over to *B.*, *B.* cannot maintain an action for non-performance of the agreement; inasmuch as the benefit of a parol agreement cannot be assigned.

On the other hand, if a parishioner refuse to pay the money due upon a parol agreement, by way of retainer of tythes, the parson, although the agreement be not binding as to the tythes, may maintain an action for the money agreed for.

It is laid down in some cases, that a lease of tythes by parol is not good; because tythes, which lie in grant, cannot pass without deed.

In other cases it is laid down, that a lease by parol of tythes is good for one year; because the lease enures *quasi* a sale of the tythes.

But the doctrine of the former cases is adhered to in two modern cases.

In one of these it was holden, that a lease by parol of tythes, even for one year, is not good.

In the other it is laid down, that tythes, which lie in grant, cannot pass without deed.

A lease of tythes, to commence at a future day is void; for, although the tythes are not parcel of but collateral to the land, the same rules are to be observed in leases of tythes as in leases of land.

## (Z) Of a Suit in a Spiritual Court for Subtraction of Tythe.

AT the common law there was no other remedy against a person who had neglected to set out or pay his tythe, than by suit in a spiritual court.

If tythe, which had been severed by a proper person from the nine parts, were afterwards carried away by a stranger, the parishioner was not answerable for it: but the remedy, against the person carrying it away, was by an action in a temporal court;

*Ibid.*  
[What shall be a sufficient notice to determine a composition that between

2 Leon. 73.  
Wellock's case. Cro. Eliz. 249.  
Godb. 273.

Cro. Eliz. 240.  
Nelson v. Woodward.

2 Show. 307.  
Eaton v. Sherwin.

Latch, 176.  
Bellamy v. Balthorp.

2 Brownl. 11. 17. [*Id. supra*, Vol. iv. p. 53, 54.]

Cro. Eliz. 249.  
Godb. 354.  
Freem. 234.

Bunb. 2.  
Kedington v. Bridgman, Hil. 2 G. 1.

8 Mod. 63.  
The King v. Fairclough, Mich. 8 G. 1.

Yelv. 131.  
Edmonds v. Booth.

Bro. Dismiss. pl. 1. pl. 5. pl. 6. pl. 10. Vaugh. 195.

Bro. Dismiss. Noy, 44. 2 Bulstr. 184. Cro. Eliz. 607.

for by the severance it was vested in the parson, and become lay chattel.

3 Bulstr. 337.  
Mountford  
v. Sidley.  
Litch, 8.

But, if the severance of the tythe were by a stranger, who had no colour of title to the land upon which it arose, this did not take away the right of the parson to sue the parishioner in a spiritual court for subtraction of tythe; because there was not such a property in the tythe vested in the parson by this severance, as would have enabled him to maintain an action at law against the person who should afterwards carry it away.

By the 32 H. 8. c. 7. § 2. it is enacted, "That in case any person shall detain and withhold any tythe, the party having cause to demand or have the same, may sue for the same in a spiritual court."

Cro. Eliz.  
407.  
Leigh v.  
Wood.

The construction of this clause has been, that if the person who has legally set out tythe afterwards carry it away, the party to whom the tythe was due may sue for it in a spiritual as well as in a temporal court; for that the words *detain and withhold* fairly extend to a carrying away of tythe after it has been set out.

*Ibid.*

But it was in the same case holden, that this clause does not give jurisdiction to any spiritual court, where tythe, which has been legally set out by a proper person, is afterwards carried away by a stranger.

If any doubt did remain, as to the carrying away of tythes, by the person who had legally set it out, this is, as to predial tythes, entirely removed by the 2 & 3 Ed. 6. c. 13. § 2. it being thereby enacted, "That if any person do willingly withdraw his tythe of corn or hay, or of such other things whereof predial tythes ought to be paid, by reason whereof the said tythe is lost, impaired, or hurt; that then upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint, the party so withdrawing shall pay the double value of the tythe so withdrawn, over and above the costs, charges, and expences of the suit: the same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws."

Nov. 44.  
Webb v.  
Potts.

The construction of this clause has been, that if a stranger carry away the tythe, after it has been legally severed from the nine parts, an action upon the statute does not lie against the stranger.

By the 2 & 3 Ed. 6. c. 13. § 2. a jurisdiction is given to spiritual courts in certain new cases, it being thereby enacted, "That if any person does stop or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view and see all manner of their predial tythes to be justly and truly set forth, and severed from the nine parts, and the same quietly to take and carry away, by reason whereof the said tythe is lost, impaired, or hurt; that then upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint, the party so withdrawing shall pay the double value of the tythe so lost, impaired, or hurt,

or over



“ over and above the costs and expences of the suit : the same to  
 “ be recovered before the ecclesiastical judge, according to the  
 “ king’s ecclesiastical laws.”

Only spiritual persons could, at the common law, sue in a spi- Bro. Dism.  
 ritual court for subtraction of tythe. pl. 9.  
 2 Inst. 643. 2 Rep. 44. Cro. Eliz. 512.

But as laymen, soon after the dissolution of monasteries, became  
 possessed of estates in tythes, it was necessary that they should be  
 enabled to sue for subtraction thereof.

For the sake of enabling them to do this, it is by the 32 H. 8.  
 c. 7. § 2. enacted, “ That in case any person shall detain and with-  
 “ hold any tythe, the party being ecclesiastical or lay person, hav-  
 “ ing cause to demand or have the said tythe, shall and may  
 “ convene the person so offending before the ordinary, his com-  
 “ missary, or other competent minister or lawful judge, of the  
 “ place where such wrong shall be done, according to the eccle-  
 “ siastical laws ; and in every such cause or matter of suit the  
 “ same ordinary, commissary, or other competent minister or  
 “ lawful judge, shall and may, by virtue of this act, proceed to  
 “ the examination, hearing, and determination of every such cause  
 “ or matter, according to the course and process of the ecclesi-  
 “ astical laws ; and thereupon may give sentence accordingly.”

It was heretofore usual to cite persons from all parts of Eng- 12 Mod.  
 land to answer for subtraction of tythe in the prerogative courts 252.  
 of Canterbury and York. Machin v.  
 Malton.

In order to put a stop to this great vexation, it is by the 23 H. 8.  
 c. 9. § 2. enacted, “ That no person shall be from henceforth  
 “ cited, summoned, or otherwise called, to appear before any or-  
 “ dinary, or other spiritual judge, out of the diocese or peculiar  
 “ jurisdiction wherein the person, who shall be cited, summoned,  
 “ or otherwise called, shall be inhabiting, at the time of the award-  
 “ ing or going forth of the same citation or summons,” except in  
 certain cases mentioned in this statute, of which subtraction of  
 tythes is not one.

It is moreover enacted, by the 32 H. 8. c. 7. § 2. “ That  
 “ every suit for subtraction of tythe shall be brought in the  
 “ court of the ordinary, commissary, or other competent mi-  
 “ nister or lawful judge, of the place where the wrong shall  
 “ be done.”

It has been holden, that the direction of the latter statute is to  
 be followed, as to the spiritual court in which a suit for subtrac-  
 tion of tythe is to be instituted.

A person who lived in the diocese of *A.* had subtracted tythe  
 in the diocese of *B.* Being cited to answer for this in the court  
 of the bishop of *B.* a prohibition was moved for ; and it was in-  
 sisted, that by virtue of the 23 H. 8. c. 9. every citation for sub-  
 traction of tythe must be to a court belonging to the jurisdiction in  
 which the person cited lives. The court being doubtful, a prohi-  
 bition was, for the sake of having the point settled, granted ; but  
 afterwards the whole court were upon deliberation of opinion,  
 that a consultation ought to be awarded.

2 Mod. 352.  
 Machin v.  
 Malton.

2 Inst. 651. At the common law only the tythe, or the value thereof, with costs of the suit, could be recovered in a suit for subtraction of tythe.

But a better remedy is given by the 2 & 3 Ed. 6. c. 13. § 2. in the case of predial tythes; it being thereby enacted, "That if any person do carry away his corn, hay, or other things of which predial tythes are due, before the tythe thereof be set forth; or do willingly withdraw any of his said predial tythes; or do stop or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view and see all manner of their predial tythes to be justly and truly set forth, and severed from the nine parts, and the same quietly to take and carry away, by reason whereof the said tythe is lost, impaired, or hurt; that then the party so carrying away, withdrawing, stopping, or letting, shall pay the double value of the tythe so taken, lost, withdrawn, or carried away, over and above the costs, charges, and expences of the suit: the same to be recovered according to the king's ecclesiastical laws."

2 Inst. 651. It is laid down, that the double value, which may be recovered under this statute in a spiritual court, is to be over and above the value of the tythe; and, consequently, that a suit in a spiritual court for subtraction of predial tythe is more advantageous than an action upon the statute in a temporal court for the treble value; inasmuch as the treble value of the tythes may be recovered in the spiritual court, together with the costs of the suit.

But it seems to be the better opinion, that only the double value of the tythe and the costs of the suit can be recovered, in a suit in a spiritual court for subtraction of a predial tythe.

Godb. 245. In a suit in a spiritual court for subtraction of tythe the sentence was, that the plaintiff, besides the double value of the tythe and the costs of the suit, should also recover the single value thereof. Baldwin v. Geery. A prohibition was awarded. And by the court—The spiritual court is not empowered by the 2 & 3 Ed. 6. c. 13. to give more than the double value of the tythe and the costs of the suit, in a suit for subtraction of tythe.

3d. 181. If the defendant die, pending a suit upon the 2 Ed. 6. c. 13. in a spiritual court for subtraction of tythe, and afterwards another suit be commenced against his executor, a prohibition lies; for the double value, given by that statute, is given by way of punishment for the personal wrong in subtracting the tythe; and an executor is not answerable for a personal wrong done by his testator. Weekes v. Truffel.

4 Inst. 324. It is in general true, that there is no method of enforcing obedience to a sentence of a spiritual court by fine, imprisonment, or amercement. 11 Rep. 41.

But by the 32 H. 8. c. 7. § 4. it is enacted, "That if any person, after a definitive sentence given against him in an ecclesiastical court for subtraction of tythe, obstinately and wilfully refuse to pay his tythe, or such sums of money wherein he shall be condemned for the same, that then two justices of the peace shall have authority by this act, upon information, certificate,

"or

“ or complaint to them made in writing, by the ecclesiastical  
 “ court that gave the same sentence, to cause the party so re-  
 “ fusing to be committed to the next gaol, and there to remain  
 “ without bail or mainprize, until he shall have found sufficient  
 “ sureties, to be bound in recognizance or otherwise before the  
 “ same justices, to the use of our sovereign lord the king, to per-  
 “ form the said sentence.”

### (A a) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tythe.

**N**otwithstanding the general jurisdiction which spiritual courts have in the matter of tythes, a prohibition in many cases lies to a suit in a spiritual court for subtraction of tythe.

But it is sometimes difficult to determine, whether a prohibition does or does not lie to such suit.

It is a rule of law, that questions concerning temporal matters are only to be tried in temporal courts.

Fitz. N. B.  
 40.  
 2 Inst. 613.

Cro. Eliz. 228. 2 Roll. Abr. 291.

But there is another rule of law, that *ubi cognitio principalis est ibi debet esse cognitio accessorii*.

2 Inst. 493.  
 Hob 188.

Sid 21. 101. Cro. Ja 269. Salk. 547.

A desire of reconciling these two rules of law, together with the difficulty of doing it, has been productive of determinations, which are not easily to be reconciled.

As some of these determinations are founded upon nice distinctions, the law, concerning the awarding of a prohibition to a suit in a spiritual court for subtraction of tythe, will be much better collected from submitting the principal cases to the reader's judgment, than from any general rules which can be laid down.

If payment be pleaded to a libel in a spiritual court for subtraction of tythe, a prohibition does not lie; because the question, whether there was such payment, is such an incidental one as may be well tried in the spiritual court.

Cro. Eliz.  
 666  
 Mallory v.  
 Mariot.

If to a libel in a spiritual court for subtraction of tythe of wood there be a plea of gross wood, a prohibition does not lie; for the question, whether the wood of which the tythe is demanded be gross wood, may be well tried in the spiritual court.

Ld. Raym.  
 835. Dike  
 Brown.

If the validity of letters patent, or of a feoffment or release, come in question in a suit in a spiritual court for subtraction of tythe, a prohibition does not lie; because the validity of either of these may be well tried in the spiritual court.

Ld. Raym.  
 74 Cham-  
 berlain v.  
 Hewitson.

If a suit be in a spiritual court for subtraction of tythe due by custom, a prohibition does not lie; for tythe due by custom may as well be sued for in a spiritual court, as tythe which is due of common right.

Hob. 247.  
 Latch, 125.  
 3 Lev. 103.  
 Bunb. 8.

A suit may be in a spiritual court for that which is to be paid as a *modus*: for as the tythe, in lieu of which it is to be paid, is so absolutely discharged, that the parson cannot resort to the taking thereof in kind, the *modus* becomes a spiritual fee, and, consequently, it is recoverable in a spiritual court.

Hob. 42.  
 247.  
 1 Ventr. 274  
 Bunb. 8.

12 Mod.

416.

Johnson v.

Ryfon.

2 Rep. 45.

The Arch-

bishop of

Canterbu-

ry's case.

Cro. Eliz.

511.

Id. Raym.

835.

Dike v.

Brown.

Salk. 655.

Nay it is said in one case, that a suit for that which is to be paid as a *modus*, can only be instituted in a spiritual court.

It was heretofore holden, that a prohibition would lie to a suit in a spiritual court for subtraction of tythe, upon the bare suggestion of a customary method of tything, or of a *modus*; although the customary method of tything, or the *modus*, had not been pleaded in the spiritual court.

It has been since holden, that a prohibition does not lie in such case, unless the cause suggested for obtaining the prohibition has been pleaded in the spiritual court; for that, as the court has a general jurisdiction in the matter of tythes, the *modus*, by which it is to be deprived of that jurisdiction, must be pleaded specially.

Bunb. 176.

Blackett v.

Finny.

But, if a bill be filed in a court of equity to establish a *modus*, and it appear, that a suit is instituted in a spiritual court for subtraction of the tythe, for which the *modus* is alleged to be a recompence, an injunction is usually granted; although the *modus* have not been pleaded.

Bunb. 17.

Offley v.

Whitehall.

Hob. 247.

1 Ventr. 165.

274.

1 Sid. 283.

If a customary method of setting out tythe, or a *modus*, be pleaded to a suit in a spiritual court for subtraction of tythe, a prohibition does not lie; unless the spiritual court have refused to admit the plea, or the truth thereof be denied.

12 Mod.

206. Hill

v. Vaux,

Salk. 655.

But, if the customary method of setting out tythe, or the *modus*, which is pleaded to a suit in a spiritual court for subtraction of tythe, appear plainly to be bad, a prohibition does not lie; although the truth of the plea be denied: for it would be quite nugatory to award a prohibition, in order to try the existence of a thing, which, if it do exist, is bad.

2 Inst. 643.

Hob. 247.

Litch, 48.

Cro. Ja. 454.

1 Ventr. 274.

2 Lev. 103.

Id. Raym.

435.

Bunb. 8. 17.

It is in general true, that if the existence of a customary method of setting out tythe, or the validity of a *modus*, come in question in a suit in a spiritual court for subtraction of tythe, a prohibition lies; because the existence of the custom or the validity of the *modus* cannot be well tried in such court. The reason is, that in some cases a usage of ten years, in others a usage of twenty years, in others a usage of thirty years, and in all a usage of forty years, does by the ecclesiastical law make a custom; whereas there cannot be a customary method of setting out tythe or a valid *modus*, unless the tythe has time immemorially been set out in the method prescribed for, or the *modus* has been paid time immemorially.

Hob. 192.

247.

Godb. 245.

Cro. Car.

113.

2 Lev. 103.

Hardr. 510.

If, after a prohibition have been awarded, issue be taken upon the existence of a customary method of setting out tythe, or the validity of a *modus*, which has been pleaded in the spiritual court, and the verdict in prohibition be, that there is not such a customary method of setting out tythe, or such a *modus*, a consultation ought to be awarded; inasmuch as the reason of tying up the hands of the spiritual court does no longer exist.

But,

But, if the verdict in prohibition find the customary method of setting out tythe, which has been pleaded in the spiritual court, to be good in part, a consultation ought not to be awarded; because, as the custom is in part good, the suit ought not to proceed in the spiritual court.

Hob. 192.  
Berrie's case.

If one *modus* be suggested as a cause of prohibition, and a verdict in prohibition find a different *modus*, a consultation ought not to be awarded; because the validity of the *modus*, which is found, cannot be well tried in the spiritual court.

Cro. Eliz.  
736. Austin  
v. Pigot.  
Heil. 100.

If the bounds of a parish come in question in a suit in a spiritual court for subtraction of tythe, a prohibition lies.

2 Roll. Abr.  
282. E. pl. 3.  
1 Vent. 335. 1 Lev. 78.

But it is said, that although a spiritual court cannot try the bounds of a parish, the bounds of a vill in a parish may be tried in such court.

1 Sid. 89.  
1 Lev. 89.

And in one case it is laid down, that a spiritual court can try the bounds of a vill in a parish.

2 Roll. Abr.  
312. pl. 7.  
Ives v. Wright.

But, if the reason of the determination in this case, which is, that the dispute was between two spiritual persons, be attended to, it by no means follows, that the bounds of a vill in a parish can in general be tried in a spiritual court.

If the right of carrying away tythe, by a particular way, come in question in a suit in a spiritual court for subtraction of tythe, a prohibition lies; because a right of way generally depends upon usage.

1 Bulstr. 63.  
Anon.

Wherever a spiritual court tries a temporal matter, which is incidental to a question concerning subtraction of tythe, the temporal matter must be tried according to the rules of the common law; otherwise a prohibition lies.

Hob. 188.  
1 Vent.  
291.  
2 Lev. 64.  
Salk. 547. Ld. Raym. 74.

If a party, who has pleaded payment to a suit in a spiritual court for subtraction of tythe, offer to prove this by one witness, and the proof be not admitted, a prohibition lies; for, although two witnesses are necessary by the ecclesiastical law in every case, the common law requires but one in this case.

Cro. Eliz.  
666.  
Mallory v.  
Mariot.

But, if a spiritual court in such case admit proof by one witness to be sufficient, that court is to judge by its own rules of the competency of the person adduced as a witness.

Salk. 547.  
Shotter v.  
Friend.

It is laid down generally in some books, that a prohibition lies to a suit in a spiritual court for subtraction of tythe after sentence.

Salk. 547.  
Ld. Raym.  
835.

In other books it is laid down, that although a prohibition does lie after sentence, in a case wherein the spiritual court had not jurisdiction in the principal matter, none lies to a suit for the subtraction of tythe after sentence: because, as the spiritual court had jurisdiction in the principal matter, the defect can only have been of jurisdiction to try some incidental matter; in which case a prohibition does not lie after sentence.

Salk. 548.  
Bunb. 17.

But, if the sentence of a spiritual court be illegal, a special prohibition may be obtained to a suit in a spiritual court for subtraction of tythe after sentence.

Codb. 245.  
Baldwin v.  
Geery.

In a suit upon the 2 E. 6. c. 13. for subtraction of a predial tythe, the sentence of the spiritual court was, that the plaintiff, besides the double value of the tythe and the costs of the suit, should likewise recover the single value of the tythe by way of damages. As a spiritual court is not empowered by that statute to give more than the double value of the tythe and the costs of the suit, the sentence was holden to be illegal; and a special prohibition was awarded.

### (Bb) Of a Suit in a Court of Equity for Subtraction of Tythe.

**T**HE courts of Chancery and Exchequer have both jurisdiction in the case of subtraction of tythe.

Bunb. 28.  
Anon.

A bill in equity may be filed for subtraction of tythe, however small the value of the tythe subtracted is.

Bunb. 115.  
Bailey v.  
Worral.  
Bunb. 263.

If a bill in equity be filed for subtraction of tythe belonging to a portion of tythes, or of the tythe of a particular thing, every person, entitled to any tythe arising in the parish in which the tythe is claimed by the bill, must be a party thereto; because the right of every such person may be affected by the decree.

Bunb 192.  
Jones v.  
Barrett.

A sequestrator cannot file a bill in equity for subtraction of tythe during the vacancy of the benefice, without making the bishop of the diocese a party; because the sequestrator is accountable to the bishop for what he receives.

Bunb. 141.  
The Bishop  
of London  
v. Nicholls.

If a bill in equity be filed by a sequestrator, during the infancy of an incumbent, for subtraction of tythe, the incumbent or his committee must be a party to the bill; otherwise, if the incumbent should recover his senses, and file another bill for the same tythe, a recovery by the sequestrator could not be pleaded in bar to the second bill.

Bunb. 325.  
Charlton v.  
Charlton.

If a rector or impropriator file a bill in equity, for subtraction of tythe belonging to a rectory, it is sufficient to shew a title to the rectory; the right of tythe being incident to the right of rectory.

Bunb. 115.  
Penny v.  
Hooper.

But an impropriator must in such bill shew that either himself, or the person under whom he claims, has an estate in fee, in the rectory.

Bunb. 296.  
Leigh v.  
Maudeffley.

It is not however necessary for an impropriator to derive his title in such bill from the original grant of the rectory by the crown; it being sufficient to shew that he is seised thereof in fee.

Cro. Eliz.  
633.

2 Bulstr. 27.  
Bunb. 7.  
72. 169.

If a vicar file a bill in equity for subtraction of tythe, he must shew himself entitled by endowment or augmentation to the tythe claimed; because a vicar can have no right to tythe, except by endowment or augmentation.

2 Bulstr. 27.  
2 Keb 729.  
Hardr. 329.  
Bunb. 7.  
169.

It is not, however, necessary for a vicar to set out in such bill the deed by which his vicarage was endowed or augmented with the tythe claimed; for if he can shew, that he and his predecessors have constantly received the tythe, it shall be intended,

that the vicarage has been endowed or augmented therewith:

If a bill be filed for subtraction of tythe belonging to a portion of tythes, the plaintiff must not only shew a title to the tythe claimed, but he must likewise shew a receipt of the tythe by himself and those under whom he claims.

Bunb. 325.  
Charlton v.  
Charlton.  
Bunb. 262.

If the defendant, in his answer to a bill in equity for subtraction of tythe, admit the plaintiff's title to the tythe claimed, and only insist upon being discharged of the tythe, or of the payment thereof, the want of having set out a title in the bill is thereby cured.

Bunb. 72.  
Pye v. Rea.  
Hardr. 130.

If a bill in equity be filed for subtraction of a predial tythe, without waiving the penalty of the treble value given by the statute, a demurrer lies; for a court of equity will never compel a defendant to discover any thing, by the discovery of which he may become liable to a penalty.

1 Vern. 60.  
Anon.  
Hardr. 137-  
190.

But, if the plaintiff in such bill only pray relief as to the single value of the tythe subtracted, it is not necessary to waive the penalty.

Bunb. 193.  
The Attorney-General  
v. Vincent.

A bill in equity having been filled for subtraction of tythe, the defendant stood out till a sequestration was granted; and the bill was of course taken *pro confesso*. The defendant afterwards moved for a rule, that upon paying costs the value of the tythe might be ascertained by the taxation of the Master, or by the oath of the plaintiff. This was refused: but a rule was made for the plaintiff to shew cause, why he should not consent to make oath of what value the tythe was.

Bunb. 26.  
Bailey v.  
Peasly.

If a tender were made before the bill in equity for subtraction of tythe was filed, and a tender be again made by the answer, the defendant is not liable to costs.

Bunb. 23.  
Anon.

But, if the defendant did not make a tender before the bill was filed, he must, notwithstanding he make a tender by his answer, account for the tythe and pay costs, how small soever the value of the tythe subtracted is.

*Ibid.*

If a bill be filed in the court of Exchequer for subtraction of tythe, and the defendant plead, that a *modus* for the tythe thereby claimed has, after directing an issue, been established by a decree of the court of Chancery, the plea is good in bar to the bill in the court of Exchequer.

Bunb. 211.  
Geale v.  
Wintour.

A plea of non-residence is good in bar to a bill in equity, brought by a rector or vicar for subtraction of tythe.

*Ibid.*

But it must be shewn, that the non-residence was before the time, in which the tythe claimed by the bill became due.

*Ibid.*

The statute of limitations cannot be pleaded in bar to a bill in equity for subtraction of tythe; because the defendant is considered as a bailiff or receiver of the plaintiff; and that statute does not extend to demands upon such persons.

Bunb. 213.  
Marlton v.  
Cleypole.

If a bill in equity be filed for subtraction of tythe due of common right, the defendant cannot avail himself of a discharge of the tythe, or of the payment thereof, unless the discharge be specially pleaded.

Bunb. 61.  
Jordan v.  
Coley.

Bunb. 297. A discharge of the tythe of one thing, or of the payment thereof, may be insisted upon, in an answer to a bill in equity for subtraction of tythes of divers things.

*Ibid.* But, if the defendant in his answer insist upon a discharge of all tythes, or of the payment thereof, and prove only a discharge of some tythes, or of the payment thereof, he cannot derive any benefit from the discharge proved.

Bunb. 30. Divers *modus*es for the tythes of divers things may be insisted upon in an answer to a bill in equity for subtraction of tythes: but they must be pleaded severally; for one *modus* cannot be pleaded distributively for the tythes of divers things.

Tarton v. Clayton. If a *modus* be insisted upon in an answer to a bill in equity for subtraction of tythe, the day upon which it is to be paid ought to be set out.

Bunb. 105. And in three modern cases the *modus*es were disallowed; because the days of paying them were not set out in the respective answers.

Goddard v. Keeble, Pasch. 3 G. 1. Pemberton v. Sparrow, Trin. 3 G. 1. Eloy v. Prior, Hil. 10 G. 1.

Bunb. 280. But in another modern case, wherein a *modus*, the day of paying which was not set out, had upon an issue directed been found for the defendant, it was holden, that the defect of having set this out was cured by the verdict; and the *modus* was established.

Woolerston v. Manwaring, Hil. 3 G. 2. In a still later case, the following distinction was taken by *Reynolds*, Chief Baron; namely, that the want of having set out the day upon which a *modus* is to be paid, in an answer to a bill in equity for subtraction of tythe, may be so supplied by evidence, as to be a foundation for the court to direct an issue to try whether there be the *modus*, with liberty to indorse the day of payment upon the *posse*; but that if a bill in equity be brought to establish a *modus*, the day of paying it must be expressly set out.

Hardr. 4. It was holden in one case, that it is incumbent upon the plaintiff to prove the quantity and value of the tythe claimed by a bill in equity for subtraction of tythe.

The Attorney-General v. Straite. But the authority of this case has been often denied; and it is now constantly holden, that the defendant must in all cases, even where a *modus* is pleaded, set out, in his answer to a bill in equity for subtraction of tythe, the quantity and value of the tythe claimed by the bill; because it frequently happens, that no person except himself knows these things.

Bunb. 60. It was not heretofore the practice of the court of Exchequer to decree, that the defendant should account for tythe, which became due after the filing of the bill for subtraction of tythe.

Gumley v. Foutleroy. But the practice at that time of the court of Chancery was to decree, that an account should be taken of all tythes due at the time of making the decree.

2 P. Wms. 463. Bell v. Read, 3 Atk. 592.]

MS. Rep. And it was said in a late case in the court of King's Bench by Lord Mansfield, Chief Justice, that the practice of the court of Exchequer is at this day the same as that of the court of Chancery.

Robinson v. Bland, Mich. 1 C. 3.



(Cc) Of a Suit in a Court of Equity to establish a *Modus*, or a customary Manner of setting out Tythes.

IT was formerly doubted, whether a bill could be filed in a court of equity to establish a *modus* by prescription, or a customary manner of setting out tythes; and such bills have frequently been dismissed.

But it is now the practice of courts of equity to retain such bill, which is in reality no more than a bill to perpetuate the testimony of witnesses, as to the *modus* or customary manner of setting out tythes.

If a bill in equity be filed against the lessee of a rector, vicar, or impropiator, to establish a *modus*, the rector, vicar, or impropiator must be a party; for a court of equity will never bind the right of any person, without giving him an opportunity of being heard.

The day on which the *modus* is to be paid must be expressly set out in a bill in equity to establish a *modus*.

But, if the setting out of the day of payment be omitted in a bill to establish a *modus*, the court will give the plaintiff leave to amend his bill, upon paying the costs of the day.

A court of equity never establishes a *modus*, or a customary manner of setting out tythe, until the validity thereof has been tried at law; in case a party, whose right may be thereby affected, desire to have it so tried.

If a bill in equity be filed to establish a *modus*, and the *modus* be not proved in the manner it is set out in the bill; yet, if the defendant admit that there is a *modus*, and the difference betwixt him and the plaintiff be only as to the extent of the *modus*, the court will direct an issue at law to try how far it does extend, with liberty to indorse the *posse* as it may be necessary.

1 Vern. 185.  
Nelf. Ch.  
Rep. 10.  
1 Chan. Ca.  
187

1 Vern. 485.  
1 Ff. Ca.  
Abr. 767.  
2 P. Wms.  
565.

Bunb. 70.  
Glanville v.  
Trelawney.

Bunb. 328.  
Gibb v.  
Goodman.

Bunb. 199.  
Blackett v.  
Finny.

Sel. Ca. in  
Chan. 534.  
Webber v.  
Taylor.

Bunb. 340.  
Laithes v.  
Christian.

(Dd) Of an Action upon the Statute against Subtraction of Tythes.

AN action lay at the common law for tenths; because a layman was at all times capable of having tenths.

Ero. Dism.  
pl. 1. pl. 5.  
pl. 6. Cro. Eliz. 599. 763.

An action also lay at the common law against the person carrying away tythe which had been legally severed; for by the severance it became a lay-chattel.

Bro. Dism.  
pl. 6. Cro.  
Eliz. 607.  
Litch, 3. 3 Buistr. 337.

But no action lay at the common law for subtraction of tythe; the remedy being only in the spiritual courts.

Bro. Dism.  
pl. 1. pl. 5.  
Vaugh. 195

Coke, Chief Justice, was of opinion, that a power is given by the 32 H. 8. c. 7. to sue for subtraction of tythe in the temporal courts.

2 Inst. 149

Vaugh. 195.  
Horden v.  
Small-  
brocke.

But this is denied by *Vaughan*, Chief Justice; and it appears, upon looking into this statute, that the power given to sue for tythe in a temporal court, is only a power to sue for an estate in tythe.

Nay, so far from giving a power to sue in temporal courts for subtraction of tythe, it is by § 8. of this statute expressly provided, "That it shall not extend to give any remedy, cause of action, or suit, in the temporal courts, against any person who shall refuse to set out his tythes, or who shall detain, withhold, or refuse to pay his tythes."

[(a) Where the declaration stated, that tythes were within 40 years next before the statute of right yielded and payable, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within memory paid

By the 2 & 3 Ed. 6. c. 13. § 1. it is enacted, "That every of the king's subjects shall from henceforth truly and justly, without fraud or guile, divide, set out, yield, and pay all manner of their predial tythes in their proper kind, as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act (a), or of right or custom ought to have been yielded or paid; and that no person shall from henceforth take and carry away any such tythes, which have been yielded or paid within forty years, or of right ought to have been yielded or paid, in the place or places tythable of the same, before he hath justly divided or set forth for the tythe thereof the tenth part of the same, or otherwise agreed for the same tythe with the parson, vicar, or other owner, proprietor, or farmer of the same tythes; under the pain of forfeiture of the treble value of the tythes so taken or carried away."

any tythe, was not thought sufficient to defeat the action. *Mitchell v. Walker*, 5 Term Rep. 260. *Steds* where there was no evidence of any payment of tythe, and the declaration only stated, that tythe had been yielded and paid 40 years before the statute. *Lord Mansfield v. Clarke*. *Id.* 264.

2 Inst. 670.  
2 Rep. 149.  
Cro. Eliz.  
621.

An information *qui tam* does not lie for the forfeiture given by this statute; because no part of the forfeiture is given to the king.

Hedl. 121.  
Lovered v.  
Owen.

But it is said that an information *qui tam* may be upon this statute, if the forfeiture be waived; for that the king would then be entitled to a fine.

Cro. Eliz.  
621.  
Johns v.  
Carne.

Although the penalty given by the 2 & 3 E. 6. c. 13. be not a certain sum of money, it has been holden that an action of debt lies upon the statute.

2 Bulst.  
184.  
Moyse v.  
Fwer.

If the owner of corn, before the corn is severed, grant it to a stranger, with an intent to defraud the parson of his tythe, this is such fraud and guile, that an action upon the statute will lie against the first owner of the corn.

2 Inst. 649.

If a man, who has fairly set out his tythe, do in a short time after carry away the same, this is fraud and guile within the meaning of the statute.

Brownl. 65.  
Pain v.  
Nicols.

In an action of debt upon the statute, the plaintiff declared for the subtraction of mixed tythes, as well as predial ones, and had a verdict as to the whole. It was insisted, that an action does not lie upon the statute for the subtraction of any tythes except predial ones; and the judgment was arrested.

An action is not by the express words of the statute given to a farmer of tythes.

But it has been holden, that as every farmer of tythes has a right to the tythes, the remedy, given by the statute, ought to be extended by equity to every such farmer.

An executor may bring an action upon the statute for subtraction of tythe due to his testator; this case being within the equity of the 4 E. 3. c. 7. by which an action is given to an executor for the goods of his testator, which were carried away during the life of his testator.

An action does not lie upon the statute against an executor: for the treble value thereby given is by way of punishment for the personal wrong; and an executor is not answerable for a personal wrong done by his testator.

In an action upon the statute against *Hancock* and two others, the defendants all joined in the plea of *nil debent*. The verdict was, that *Hancock* owed eighteen pounds; but that the other two owed nothing. It was moved in arrest of judgment, that the action ought not to have been a joint action: but after great debate and deliberation the court were unanimously of opinion, that the action was well brought; for that, as it is founded upon a tort and not upon a contract, one of the defendants may, as is frequently done in other actions founded upon torts, be found guilty, and the others may be acquitted.

In an action upon the statute the plaintiff declared, that the defendant was occupier of the land, upon which the tythe arose, from the tenth day of *March* for the space of six months; that in the *August* following he cut the corn growing thereupon; and that after the expiration of his term he carried away the corn without having set out the tenth part thereof. An objection was taken, that it appeared from the plaintiff's own shewing, that the defendant was not occupier of the land at the time of the supposed subtraction of the tythe: but it was holden, that as he was the owner of the corn at that time, the action was well brought.

It is not necessary for the person, who brings an action upon the statute, to set out a title to the tythe in question; because as the action is in the nature of an action of trespass founded upon a tort, it is sufficient to shew a possession of the tythe in the plaintiff.

If a certain lease of the tythe be declared upon in an action upon the statute, and the jury find a different lease, the variance is not fatal; because the allegation of the lease is only inducement to the action; the wrong in carrying away the tythe being the ground thereof.

It is necessary for the person, who brings an action upon the statute, to shew, that the defendant was one of the king's subjects at the time of subtracting the tythe.

But, if it be alleged, that the defendant was occupier of the land at the time of subtracting the tythe, it is well enough; be-

*Moore*, 215.  
*Day v.*  
*Peckwell*.  
*Cro. Ja.* 70.

1 *Ventr.* 30.  
*Moreton's*  
*case*.  
*Sid.* 407.  
1 *Ventr.* 60.

*Sid.* 181.  
*Weeks v.*  
*Truſſell*.  
*Sid.* 407.

*Comb.* 361.  
*Baird v.*  
*Hancock*.

*Cro. Ja.*  
324.  
*Kipping v.*  
*Swaine*.

2 *Lev.* 1.  
*Cro. Ja.*  
68. 361.  
437.  
1 *Ventr.* 136.  
2 *Bullstr.* 67.

*Cro. Ja.* 323.  
*Wheeler v.*  
*Haydon*.  
2 *Bullstr.* 86.

*Cro. Ja.*  
324.  
*Kipping v.*  
*Swaine*.

*Hardr.* 173.  
*Phillips v.*  
*Kettle*.

cause it may be fairly inferred, that he was one of the king's subjects at that time.

Carth. 204.  
Aulton v.  
Bucknigh,  
Cro. Ja. 70.  
The declaration in an action upon the statute must shew, that the defendant had made no agreement with the plaintiff for the tythe, before he carried it away; for the statute has these words, *or otherwise agreed for the same tythe.*

Sty. 103.  
178.  
Southcot v.  
Southcot.  
In an action upon the statute, the plaintiff declared for a certain quantity of grain. It was objected, that the word grain, which comprehends seeds of divers sorts, is of too general signification, and that the particular kind of grain ought to have been alleged: but the declaration was holden to be good; for that the word grain does in its usual signification mean corn.

Cro. Ja.  
438.  
Sanders v.  
Sanders.  
It is sufficient, in an action upon the statute, to allege the value of the whole tythe subtracted, without shewing the quantity or value of the particular kinds of tythes.

Cro. Ja.  
498. Pembrerton v.  
Suckton.  
The plaintiff may recover, in an action of debt upon the statute, notwithstanding the sum found by the verdict be less than the sum alleged in his declaration to be due: for although it be in the general true, that the plaintiff cannot recover in an action of debt a less sum than he declares for, he may, as no certain penalty is given by the statute, recover in this action the value of the tythes subtracted.

Cro. Car.  
513.  
Talory v.  
Jackson.  
Bunb. 213.  
The statute of limitations cannot be pleaded in bar to an action upon the statute; because the occupier is considered as a bailiff or receiver; and the statute of limitations is no bar to a demand upon such persons.

2 Inst. 651.  
Moor, 914.  
Carth. 361.  
The more proper plea in an action of debt upon the statute is *nil debet*: but it has been holden, that, as the action is founded upon a tort, not guilty is a good plea.

2 Med. 321.  
322.  
James v.  
Trollop.  
If a defendant, against whom an action upon the statute is brought, would avail himself of a *modus* by deed, the deed must be pleaded: and the deed is pleadable, although the date thereof be beyond time of memory, and it was not allowed in a court of eyre; for an allowance before justices in eyre was not necessary in the case of a private deed.

Bro. Prefec.  
pl. 17.  
A prescription *in non decimando* cannot be pleaded in the negative to an action upon the statute: but the plea must be, that the defendant and all those whose estate he has, have, for time whereof the memory of man is not to the contrary, enjoyed the premises without paying tythe for the same.

1 Jo. 6.  
Slade v.  
Drake.  
1 Lev. 185.  
If the plea to an action upon the statute be, that the premises of which tythe is claimed were discharged thereof in the hands of an abbot, it must be shewn in what manner they were discharged; for, as a discharge of tythes is against common right, it shall be intended, unless the contrary appear, that the discharge was personal.

Cro. Eliz.  
584.  
Button v.  
Long.  
2 Inst. 651.  
If a discharge of tythe, by reason of unity of possession in the hands of an abbot and his successors, be pleaded to an action upon the statute, the unity of possession is traversable.

In an action upon the statute the plaintiff was not heretofore in any case entitled to costs of suit.

But

But by the 8 & 9 W. 3. c. 11. § 3. it is enacted, "That in all actions of debt upon the 2 & 3 E. 6. c. 13. wherein the single value found by the jury shall not exceed the sum of twenty nobles, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall recover his costs of suit."

It has been holden, that the defendant, in an action upon the statute, is not entitled to costs; because, as the action is not an action of debt upon a specialty, nor an action for a personal wrong done immediately to the plaintiff, the wrong in this case arising from a non-feasance and not from a mal-feasance, it is not within the meaning of the 23 H. 8. c. 15. by which costs are in divers cases given to a defendant.

But by the 8 & 9 W. 3. c. 11. § 3. it is enacted, "That if the plaintiff, in any action of debt upon the 2 & 3 E. 6. c. 13. shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs of suit."

### (Ee) Of recovering in a summary Way the Value of small Tythes subtracted.

BY the 7 & 8 W. 3. c. 6. § 1. it is for the more easy recovery of small tythes, where the same do not amount to above the yearly value of forty shillings from any one person, enacted, "That if any person shall subtract or withdraw, or fail in the payment of such small tythes, by the space of twenty days after demand thereof, that then it shall be lawful for the person, to whom the same shall be due, to make his complaint in writing to any two justices of the peace within the county or place where the same shall grow due; neither of which justices is to be patron of the church whence the said tythes arise, or any ways interested in such tythes."

But by § 6. it is provided, "That no complaint shall be heard as aforesaid, unless it shall be made within two years after the same tythes become due."

And by § 13. it is provided, "That no person, who shall begin any suit for the recovery of such small tythes in the court of Exchequer, or in any ecclesiastical court, shall have any benefit of this act for the same matter."

By § 2. it is enacted, "That the said justices shall summon in writing under their hands and seals, by reasonable warning, every person against whom any complaint shall be made as aforesaid, and after his appearance, or upon default of appearance, the said warning being proved before them upon oath, the said justices shall proceed to hear and determine the said complaint, and shall in writing under their hands and seals adjudge the case, and give such reasonable allowance for such tythes as they shall judge to be just, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just."

And

And by § 4. the justices are empowered to administer an oath to any witness produced.

But by § 8. it is enacted, "That if any person complained against shall insist upon any prescription, composition, *modus decimandi*, or other title, whereby he ought to be discharged of tythes; and shall deliver the same in writing to the said justices; and shall give to the party complaining sufficient security, to pay all such costs as shall be given against him upon a trial at law, in case the said title shall not be allowed; that then the said justices shall forbear to give judgment."

By § 3. "A distress is given, in case of refusal or neglect, by the space of ten days after notice given to pay such sum as upon such complaint shall be adjudged as aforesaid."

By § 12. it is enacted, "That the said justices shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they find the complaint false and vexatious."

By § 5. it is provided, "That this act shall not extend to tythes within the city of *London*, or in any other place where the same are settled by act of parliament."

By § 7. An appeal is given to the sessions, and it is moreover enacted, "That if the justices there present, or the majority of them, shall confirm the judgment of the two justices, they shall decree the same by order of sessions, and proceed to give such costs against the appellant as to them shall seem just and reasonable."

By the same section it is enacted, "That no proceeding or judgment, had by virtue of this act, shall be removed or superseded, by any writ of *certiorari*, or other writ, out of his majesty's courts at *Westminster*, or any other court whatsoever, unless the title to such tythes shall be in question."

### (Ff) Of recovering Tythes due from *Quakers*.

BY the 7 & 8 W. 3. c. 34. § 4. it is enacted, "That where any *Quaker* shall refuse to pay or compound for his great or small tythes, it shall be lawful for the two next justices of the peace of the same county, other than such justice of the peace as is patron of the church or chapel to which the said tythes belong, or any ways interested in the said tythes, upon the complaint of the person who ought to have and receive the same, by warrant under their hands and seals to convene before them such *Quaker*, and to examine upon oath, which oath the said justices are empowered to administer, or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain what is due from such *Quaker* to the party complaining, and by order under their hands and seals to direct the payment thereof, so as the sum ordered as aforesaid do not exceed 10*l.*; and upon refusal by such *Quaker* to pay according to such order, it shall be lawful for any one of the said justices, by warrant under his hand and seal, to levy

" the

“ the money thereby ordered to be paid, by distress and sale of  
“ the goods of such offender.”

By the same section it is enacted, “ That any person, finding him-  
“ self aggrieved by any judgment given by such two justices of  
“ the peace, may appeal to the next general quarter-sessions, and  
“ the justices of the peace there present, or the major part of  
“ them, shall proceed finally to hear and determine the matter;  
“ and if the justices then present, or the major part of them,  
“ shall find cause to continue the said judgment, they shall then  
“ decree the same by order of sessions, and shall proceed to give  
“ such costs against the appellant as to them shall seem just and  
“ reasonable.”

And by the same section it is enacted, “ That no proceeding or  
“ judgment, had by virtue of this act, shall be removed or super-  
“ seded by any writ of *certiorari*, or other writ, out of his ma-  
“ jesty’s courts at *Westminster*, or any other court whatsoever,  
“ unless the title to such tythes shall be in question.”

By the 1 *Geo. 1. st. 2. c. 6. § 2.* the like remedy is given for  
the recovery of all tythes, and all other ecclesiastical dues, from  
*Quakers*, as is by the 7 & 8 *W. 3. c. 34.* given for tythes to the  
value of ten pounds.

And it is thereby further enacted, “ That any two or more  
“ justices of the peace of the same county or place, other than  
“ such justice as is patron of the church or chapel to which the  
“ said tythes or dues belong, or any ways interested in the said  
“ tythes, upon complaint of any parson, vicar, curate, farmer,  
“ or proprietor of such tythes, or other person who ought to have,  
“ receive, or collect any such tythes or dues, are hereby re-  
“ quired to summon in writing under their hands and seals, by rea-  
“ sonable warning, such *Quaker* or *Quakers* against whom such  
“ complaint shall be made; and after his or their appearance, or  
“ upon default of appearance, the said warning or summons be-  
“ ing proved before them upon oath, to proceed to hear and de-  
“ termine the said complaint, and to make such order therein as  
“ in the said act is limited or directed; and also to order such  
“ costs and charges, not exceeding ten shillings, as upon the me-  
“ rits of the cause shall appear just; which order shall and may  
“ be appealed to, and on such appeal may be reversed or affirmed  
“ by the general quarter-sessions of the county or place, with such  
“ costs and remedy for the same, and shall not be removed into  
“ any other court, unless the title to such tythes shall be in ques-  
“ tion, in like manner as in and by the 7 & 8 *W. 3. c. 34.* is  
“ limited and provided.”

(G g) What Remedy an Occupier has, when the  
Person entitled to Tythe does not fetch it away  
in a reasonable Time.

**I**F the person entitled to the tythe of milk do not fetch it away  
before the next milking-time, the parishioner may pour it upon  
the

Bunb. 73.  
Dodson v.  
Oliver.

the ground; because he may then have occasion for the pail, or other vessel, in which it was set out.

3 Bulstr.

337.

Mountford

v. Sidley.

Latch, S.

Although a predial tythe be not fetched away in a reasonable time by the person entitled thereto, the occupier of the land, upon which it is set out, cannot justify the distraining thereof damage-feasant; but he may have an action for the damage sustained by its lying too long upon the land.

Ld. Raym.

137.

Shapcott

v. Alagford.

20 edit.

1705.

Ld. Raym.

138.

Shapcott v.

Mountford.

Com. 24.

The occupier of the land, upon which tythe is set out, cannot justify the putting of his cattle upon the land, before the tythe is fetched away; for it is probable, that the person entitled thereto would sustain more damage by having his tythe destroyed by the cattle, than the occupier would by being deprived for some time of the use of his land: and it is much more reasonable to leave the occupier to his remedy by action, than to suffer him to judge when the tythe has lain there too long.

2 Leon. 101.

Benner v.

Shortwright.

Cio Eliz.

206.

But, if the person entitled thereto have neglected to fetch away tythe in a reasonable time, and cattle, either of the occupier of the land upon which the tythe is set out, or of a stranger, do without the default of the occupier come upon the land, and destroy the tythe, the loss must fall upon the person who neglected to fetch it away.

Latch, S.

Sullivan v.

Chanet.

Ld. Raym.

189.

An action of trespass does not lie against the person entitled to tythe for not having fetched it away in a reasonable time; because the injury to the occupier of the land does not arise from a mal-feasance but from a non-feasance.

3 Bulstr.

337.

Mountford

v. Sidley.

Latch, S.

But the remedy of the occupier of the land, in case the tythe be not fetched away in a reasonable time, is by an action upon the case.

Ld. Raym. 188.

3 Bulstr.

337.

Mountford

v. Sidley.

Latch, S.

An action for not having fetched away tythe in a reasonable time does not lie, unless the tythe were set out by a person who had some colour of title to the land upon which it arose; because, as the severance of tythe by a stranger does not vest such a property in the person entitled thereto, as to enable him to maintain an action against a person who afterwards carries it away, it is not reasonable that he should be liable to an action for not having fetched it away.

1 Roll. Abr.

643. X.

pl. 1.

Before the occupier of the land can maintain an action against the person entitled thereto for not having fetched away tythe in a reasonable time, he must give notice of its being set out; because, as the former was not obliged to give notice at what time he intended to set the tythe out, the latter may not know that it is set out.

3 Bulstr.

336.

Mountford

v. Sidley.

Bro. Dism.

pl. 12.

Ld. Raym.

139.

And after the person entitled thereto has had notice of tythe being set out, he must, before an action can be maintained against him for not having fetched the tythe away, have a reasonable time to fetch it away; and the question, What is a reasonable time, is proper for the determination of a jury.

Str. 245, 246. South v. Jones.





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